IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 551

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF THE INLAND WATERWAYS, INC., A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR CONTRACTS RELIEF BOARD,
Respondents.

BRIEF AND ARGUMENT OF PETITIONER.

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INDEX.

Cases.

TEXTBOOKS.

STATUTES AND REGULATIONS.

MISCELLANEOUS.

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THE OFFICIAL REPORTS OF THE OPINIONS DELIVERED BY THE COURTS BELOW.

The decisions sought to be reviewed are:

(1) that of the United States Court of Appeals for the Eighth Circuit, entered on August 24, 1949, and reported in 176 Fed. 2nd 599 (Rec. p. 36) sustaining:

(2) the decision of the District Court of the United States for the District of Minnesota, 5th Division, 49 Fed. Supp. 675, entered on August 28, 1948 (Rec. p. 16).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (Judicial Code, Section 1254) and under Section 2 of Article III of the Constitution of the United States. The subject matter involves the interpretation of a Federal Statute—Public Law 657, 41 U. S. C., Par. 106, Note, 60 Stat. 902.

STATEMENT OF THE CASE.

The petitioner, as Trustee in Bankruptcy of Inland Waterways, Inc., brought this action under the War Contracts Hardship Claims Act (Lucas Act, Act of August 7, 1946, 41 U. S. C. 106, Note, 60 Stat. 902) (Appendix, p. i) to recover of the United States $328,804.42 as losses alleged to have been sustained by the bankrupt in the performance of certain contracts with the Navy Department.

The District Court sustained a motion of the United States for a summary judgment (Rec. p. 17) based solely upon the allegations of the complaint and a written agreement which had settled certain matters in dispute between the parties, which agreement was approved by the District Court in certain bankruptcy proceedings, in another case. The petitioner appealed from said judgment to the United States Court of Appeals for the Eighth Circuit which affirmed the judgement of the District Court (Rec. p. 36).

The motion for a summary judgment in the District Court (Rec. p. 8) was based solely on the pleadings and an exhibit (Rec. p. 9) attached to the Motion which is a

copy of the Settlement Agreement. No evidence was taken; no witnesses were sworn; the disposition of the rights of the petitioner were decided on the pleadings alone—on questions of law. There remains an issue of fact which can only be determined upon a hearing on the merits.

The issues involved in the granting of respondent's Motion to Dismiss (Rec. p. 8) deal only with questions of law in the interpretations as to the meaning and purpose of the legislation upon which the petitioner's claim is based. (Lucas Act, Act of August 7, 1946, Appendix, p. i).

A decision by this Court on those questions of law will affect all of the cases involving that Act which are now pending and undetermined in various United States Courts throughout the nation.

The broad fundamental issue involved in this and in all of the other cases now pending is whether the Lucas Act above referred to is merely an extension of the First War Powers Act, 1941 or whether it is legislation which intended to grant relief to all contractors, subcontractors, and materialmen who suffered losses on the sum total of all of their war contracts with the Government, without fault or negligence on their part.

In the event the conclusion would be that the Lucas Act is merely an extension of the First War Powers Act, 1941, there would then be a basis for the opinions of the Courts below.

If, however, the conclusion is (and the petitioner contends that it is inescapable) that the Lucas Act goes far beyond the purposes of the First War Powers Act, 1941 and intended to grant a fair and equitable settlement of claims for losses incurred without fault or negligence on the part of the contractor, subcontractor, or materialmen, then the opinions of the Courts below are erroneous and we then must measure the claims filed, on the equitable

principles so clearly and adequately set forth in the Act itself, and allow the petitioner's claim pursuant to the formula set forth in the Act.

The questions presented and a specification of such of the assigned errors as are intended to be urged are set forth herein under the title of "Assigned Errors".

This is the fundamental issue involved, but other issues must be determined which will affect not only the instant proceeding but practically all of the other pending claims under the Lucas Act.

These issues briefly summarized are:

(1) Whether petitioner's claim under the Lucas Act discloses any written request for relief as required by the Act.

(2) The validity of Sections 204 and 307 of Executive Order 9786 which were purportedly promulgated pursuant to the provisions of the Lucas Act.

(3) Whether petitioner's claim is barred by the execution of a settlement agreement between the petitioner and the respondent which was entered into prior to the passage of the Lucas Act.

(4) Whether the War Contracts Hardship Claims Act (Lucas Act) is merely an extension of Section 201 of the First War Powers Act, 1941, or whether it is an Act which is broader in scope and was intended to go far beyond the relief which could have been granted under the First War Powers Act, 1941, by granting equitable relief entitling contractors, subcontractors, and materialmen to recover losses on war contracts incurred without fault or negligence on their part.

The petitioner filed an appeal from the Order of the District Court dismissing the proceedings (Rec. p. 16). An appeal was taken to the United States Court of Appeals

for the Eighth Circuit which affirmed the order of the District Court in 176 Fed. 2nd 599 (Rec. p. 36) on August 24, 1949.

The statute involved is Public Law 657 (79th Congress, Chapter 864—2nd Session) 41 U. S. C., Par. 106, Note, 60 Stat. 902, and popularly known as the Lucas Act.

The Act is set forth in full in the Appendix, p. i.

The regulations involved are Sections 204 and 307 of Executive Order 9786 (11 F. R. 11553) and are set forth in full in the Appendix, p. iv.

ASSIGNED ERRORS.

The Courts below erred:

1. By holding that the War Contracts Hardship Claims Act (Lucas Act, Public Law 657) (Appendix, p. i) is merely an extension of the First War Powers Act, 1941; and by not finding that said legislation was designed for the purpose of granting equitable relief which would entitle contractors, including the petitioner, to recover losses on war contracts which were incurred without fault or negligence on their part.

2. By holding that petitioner's claim (Rec. p. 32, 33) failed to disclose a written request for relief required by the Act involved; and by not finding that the petitioner's claim discloses proper written requests for relief as contemplated by the Lucas Act.

3. By holding that petitioner's claim (Rec. p. 32, 33) is barred by the Settlement Agreement (Rec. p. 9) between the petitioner and the Government, entered into prior to the enactment of the legislation involved herein; and by not holding that petitioner is entitled to relief under Section 3 (Appendix, p ii) of the Act which provides: "* * * but a previous settlement under the First War Powers Act, 1941 or the Contract Settlement Act of 1944 shall not operate to preclude relief otherwise allowable under this Act."

4. By holding that Sections 204 and 307 of Executive Order 9786 (Appendix, pp. vi, vii) are valid regulations promulgated pursuant to the Lucas Act; instead of finding that said Sections 204 and 307 of Executive Order 9786 are regulations which contain provisions in conflict with the Act and which are therefore invalid.

POINTS RELIED UPON AND TO BE ARGUED AND AUTHORITIES IN SUPPORT THEREOF.

I.

THE PETITIONER'S CLAIM (REC. PAGES 32, 33) CONTAINS A PROPER WRITTEN REQUEST FOR RELIEF PURSUANT TO THE REQUIREMENTS OF THE WAR HARDSHIP CLAIMS ACT (LUCAS ACT, PUBLIC LAW 657).

Fogarty v. *United States* (Ct. of Appeals), 176 Fed. 2nd 599.

Section 307 of Executive Order 9786 (11 F. R. 11553).

Stephens-Brown, Inc. v. *United States*, 81 Fed. Supp. 969 (W. D. Mo.).

Warner Construction Co. v. *Krug*, 80 Fed. Supp. 81 (D. D. C.).

Howard Industries, Inc. v. *United States*, Court of Claims No. 48874 decided April 4, 1949.

United States ex rel. Tungsten Reef Mines v. *Ickes*, 84 Fed. 2nd, 257 (Appeals D. C.).

Crimora Manganese Corporation, et al. v. *Wilbur*, 47 Fed. 2nd 417, 421 (Appeals D. C.), cer. d. 283 U. S. 861.

Marshall v. *Wilbur*, 47 Fed. 2nd 421.

Milwaukee Engineering & Shipbuilding Co., Navy Department War Contracts Relief Board, December 9, 1947, Government Contracts Reporter, 4 C. C. F., Par. 60,452.

II.

SECTIONS 204 AND 307 OF EXECUTIVE ORDER 9786, PRESUMABLY PROMULGATED PURSUANT TO PUBLIC LAW 657, 79TH CONGRESS, AUGUST 7, 1946, ARE IN DIRECT CONFLICT WITH THE PROVISIONS OF PUBLIC LAW 657 AND ARE THEREFORE INVALID AND CANNOT BE INVOKED AGAINST THE PETITIONER.

Section 204, Executive Order 9786 (11 F. R. 11553).

Act of August 7, 1946, Public Law 657, 79th Congress, 2nd Session, 41 U. S. C. 106 note, 60 Stat. 902, S. 1477.

Section 2(a)

Section 3

American Jurisprudence, Vol. 50, Page 204, par. 225.

Browder v. *The United States*, 312 U. S. 335, 85 L. Ed. 862.

Walker v. *United States*, 83 Fed. 2nd 103.

Osaka Shosen Kaisha Lines v. *United States*, 300 U. S. 98; 81 L. Ed. 532; 57 S. Ct. 356.

Union Trust Co. of Rochester v. *United States*, 5 Fed. Supp. 259 (W. D. N. Y.), Aff'd 70 Fed. 2nd 629; cert. d. 293 U. S. 564.

Manhattan General Equipment Company v. *Commissioner*, 297 U. S. 129; 80 L. Ed. 528.

Goldsborough v. *United States*, 80 Fed. Cases No. 5519.

Deming v. *M. C. Claughry*, 113 Fed. 639, aff'd 186 U. S. 49, 186 L. Ed. 1049.

Houghton v. *Payne*, 194 U. S. 88, 48 L. Ed. 888.

Smith v. *Payne*, 194 U. S. 104, 48 L. Ed. 893.

Harris v. *Bell*, 254 U. S. 103, 103 L. Ed. 159.

People ex rel. Chadwick v. *Sergel*, 269 Ill. 219, 110 N. E. 124.

United States v. *George S. Bush & Co.*, 310 U. S. 371, 84 L. Ed. 1259.

Neuberger v. *Commissioner*, 311 U. S. 83, 85 L. Ed. 58.

Work v. *Rives*, 267 U. S. 175, 69 L. Ed. 561.

Grover v. *Merritt Development Co.*, 47 Fed. Supp. 309 (D. Minn.).

Hamilton v. *Dillin*, 82 U. S. 528, 21 Wall. 73.

Corpus Juris, Vol. 59, Page 952.

Merritt v. *Welsh*, 104 U. S. 694, 26 L. Ed. 896.

House Report 2576, 79th Congress, 2nd Session on S. 1477.

U. S. v. *Blair*, 321 U. S. 730; 88 L. Ed. 1039.

Interstate Natural Gas Co. v. *Federal Power Commission*, 156 Fed. 2nd 949, 952, aff'd 331 U. S. 682; 91 L. Ed. 1742.

Senate Report 1559, 80th Congress, 2nd Session.

Warner Construction Co. v. *Krug*, 80 Fed. Supp. 81 (D. D. C.).

Stephens-Brown, Inc. v. *United States*, 81 Fed. Supp. 969 (W. D. Mo.).

Hearings before a Committee of the Judiciary, United States Senate 79th Congress, 2nd Session on S. 1477.

First War Powers Act, 1941, Sec. 201, 55 Stat. 838-41, 50 U. S. C. App. 611.

Border Pipe Line Co. v. *Federal Power Commission*, 171 Fed. 2nd 149, 152.

Zazove v. *United States*, 162 Fed. 2nd 443.

Justice Jackson in 34 American Bar Assn. Journal 535.

Act of June 25, 1948 amend Sec. 6 of P. L. 657; P. L. 773, 80 Cong., 2nd Sess.; 62 Stat. 869, Sec. 37.

III.

THE SETTLEMENT AGREEMENT OF FEBRUARY 20, 1945 IS NO BAR TO PETITIONER'S CLAIM UNDER PUBLIC LAW 657.

Warner Construction Co. v. *Krug*, 80 Fed. Supp. 81 (D. D. C.).

Illinois Surety Co. v. *United States*, 240 U. S. 214; 60 L. Ed. 609.

First War Powers Act, 1941, Sec. 201, 55 Stat. 838-41; 50 U. S. C. App. 611.

Executive Order 9001 (6 F. R. 6787).

Contract Settlement Act of 1944, 58 Stat. 649; 41 U. S. C. 101-125.

Webster's 20th Cent. Dict. unabridged (Devlin, 1937), 1519—"settle".

Coleman v. *Ferrar*, 112 Mo. 54; 20 S. W. 441.

United Concrete Form Products Company, Inc. Commerce Clearing House 4 C. C. F. Par. 60,449.

Black, Dictionary of Law (1891), 1087—"settlement".

Howard Industries v. *United States*, Court of Claims No. 48874.

Navy Procurement Directive, July 7, 1943, Commerce Clearing House, Government Contracts Reporter, Vol 1, p. 2272.

Bankruptcy Act, Sec. 27 (U. S. C., Title 11, Chapter 4, Section 50).

Collier on Bankruptcy, 14th Ed., Vol. 2, Pp. 1082, 1090.

Sobod, Inc., 25 Fed. Supp. 344.

Stewart et al., In re National Artificial Silk Co., 272 F. 938 (C. A. 6th Cir.).

Lefor v. *Jones*, 338 Ill. A. 173; 87 N. E. 2nd 48.

Hodgson v. *Vroom*, 266 F. 267.

IV.

RECENT CONGRESSIONAL ACTION CLEARLY INDICATES THAT THE OPINIONS OF THE COURTS BELOW, FROM WHICH THIS APPEAL IS TAKEN, ARE ERRONEOUS AS BEING BASED UPON A MISINTERPRETATION OF PUBLIC LAW 657.

Senate Report, Calendar No. 1612, Report No. 1632, 81st Congress, 2nd Session.

House, Doc. No. 629, 81st Congress, 2nd Session, Cong. Rec. Vol. 96 No. 129, page 9745.

Senate, Doc. No. 203, 81st Congress, 2nd Session, Cong. Rec. Vol. 96 No. 165, page 13143.

Cong. Rec. Vol. 96, No. 147, page 11224, July 26, 1950, on S. 3906.

Cong. Rec. Vol. 96, No. 113, page 8406.

House Report No. 422, 81st Congress, 1st Session, *re:* H. R. 3436.

House Report No. 2704, July 20, 1950, 81st Congress, 2nd Session.

ARGUMENT.

I.

THE PETITIONER'S CLAIM (REC. PAGES 32, 33) CONTAINS A PROPER WRITTEN REQUEST FOR RELIEF PURSUANT TO THE REQUIREMENTS OF THE WAR HARDSHIP CLAIMS ACT (LUCAS ACT, PUBLIC LAW 657).

The statute under consideration is popularly known as the Lucas Act, Public Law 657, 79th Congress and is entitled "An Act to Authorize Relief in Certain Cases where Work, Supplies, or Services have been Furnished for the Government under Contracts During the War."

The Act is brief and is set forth in full in the Appendix at Page ..... A mere reading of the language of the Act, and that especially set forth in Section 3 thereof, and Sections 204 and 307 of Executive Order 9786, will indicate contradictions between the Act and the portions of the Executive Order referred to, with respect to what constitutes a "written request for relief".

The District Court and the Court of Appeals for the Eighth Circuit contend that the plaintiff is not entitled to relief under this Act by reason of the fact that the plaintiff had not filed a written request for relief from losses *within the meaning of the Act.*

The opinions of said Courts do not contend that the plaintiff filed no written request for relief whatsoever. The opinion of the District Court merely sets forth that "It is not sufficient that a request for some sort of relief was filed. A request for relief from a loss must definitely be a request for an amendment to a contract without consideration under the First War Powers Act" (Record, page 19). In the prior paragraph of the Court's opinion,

the District Court expressed this interpretation of the Act: "Congress under the Act of August 7, 1946 intended to limit consideration to a request for relief from loss under the First War Powers Act which was undetermined on August 14, 1945" (Record, page 19). The Court of Appeals is of the same opinion. This is indicated in 176 Fed. 2nd 599, at page 601 (Record, page 40) wherein the Court of Appeals holds:

> "For, if, as we hold, appellant never on or before August 14, 1945, filed a written request for relief under the First War Powers Act, 50 U. S. C. A. Appendix, Par. 601 *et seq.*, it follows that there was never "a previous settlement" (sec. 3 of the Act of August 7, 1946) of such a claim; and the validity of that part of paragraph 204 of Executive Order 9786 providing that no claim under the Act shall be considered if final action with respect thereto had been taken on or before August 14, 1945, is not involved in the present case."

The above statement of the law is violently opposed to the interpretations of the Lucas Act contended for by this petitioner and the opinions of other Courts, which opinions we shall call to the Court's attention, and the recently expressed opinions of Congress itself to which reference is made under Point IV. The Court of Appeals in this case insists that the Lucas Act is a mere extension of the First War Powers Act, 1941; other Courts and the recent pronouncements of Congress (set out under Point IV of this Brief) establish that the Lucas Act is remedial legislation wholly independent of the First War Powers Act, 1941 and is intended to go far beyond the relief granted by the First War Powers Act, 1941.

Prior to the enactment of the Lucas Act there was no right whatsoever to reimbursement by either a contractor or a subcontractor for losses sustained unless the contract that was entered into so provided. Section 201 of the First

War Powers Act authorized amendments or modifications of contracts where the President deemed such amendments or modifications "would facilitate the prosecution of the War."

The Act under consideration here clearly states that its purpose is based upon other principles. The rights of a claimant under the Lucas Act is afforded him on the theory that where Government contracts are performed by a contractor without fault or negligence on his part and he sustains a loss in the performance thereof, that our Government, as a matter of equity and fair dealing, has determined that he will be reimbursed for such losses.

The Courts below, in these proceedings, apparently must have considered the Regulations promulgated by the President (Executive Order 9786) and not the language of the Act itself. This conclusion is based upon the fact that Section 3 of the Act contains no such language limiting claimants to First War Powers Act relief, but that Sections 204 and 307 of Executive Order 9786 does tend to contain such limitations which are not a part of the Act. Section 307 of Executive Order 9786 provides in part that a loss claimed shall not be granted under the Act unless "such other war agency finds that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945." It is, therefore, only by virtue of the language of the Regulations and not the language contained in the Act itself that justifies the conclusions in the opinions of the District Court and the Court of Appeals for the Eighth Circuit. The material variance between the Act and the regulations referred to is condemned by the Courts in the following cases:

Stephens-Brown, Inc. v. *United States*, 81 Fed. Supp. 969.

Warner Construction Co. v. *Krug, et al.*, 80 Fed. Supp. 81.

Howard Industries, Inc. v. *United States*, Court of Claims No. 48874.

and in recent expressions of Congress itself, which are discussed under Point IV of this Brief.

There is no precise form prescribed by Congress and there is no specific requirement in the Act itself as to what constitutes a request for relief. The decisions cited in the memorandum of the District Court have no application to the Act under consideration by reason of the fact that they concern themselves with acts of a different character wherein certain *jurisdictional* requirements were lacking.

The case of *United States ex rel. Tungsten Reef Mines Co.* v. *Ickes*, 84 Fed. 2nd 257 (Appeals D. C.) (Printed Record, page 20) referred to in the District Court memorandum is definitely not in point. At page 260 of the case the court says, "And so here the consent order that was entered, being beyond the court's jurisdiction, was a nullity. The defect was not formal or modal. It was jurisdictional. It was indispensable in the circumstances, that jurisdiction should be shown, for until it was shown there was nothing on which the court could act."

The case of *Crimora Manganese Corporation, et al.* v. *Wilbur*, 47 F. 2nd 417, 421 (Appeal D. C.) cer. d. 283 U. S. 861 (Record, page 20) referred to by the District Judge as additional authority states at page 421 thereof: "It may be added that the petition though replete with general allegations of 'stimulation' by the 'war-time agencies of the United States' nowhere names as the stimulator any one of the five agencies specified by the statute. This alone would seem to render the petition defective."

A reading of the case would indicate that one of the questions involved dealt with a charge by the plaintiff

that it was coerced into doing certain things (the specific word used in the Complaint was 'stimulated') by one of the agencies of the Government and the court held that failing to name one of the five agencies specified by the statute would render the petition defective. So that we can readily see that the objection to the pleading was that the FACTS were not sufficiently set forth.

The case of *Marshall* v. *Wilbur*, 47 Fed. 2nd 421 (Printed Record, page 20) cited by the District Court, is to the same effect as the previous case, which contended for losses sustained by "stimulation" by the request, demand, solicitation and appeal of the United States of America and its agencies which urged and "stimulated" and the Complaint nowhere mentions any one of the five agencies named in the statute.

In the instant proceedings, the jurisdictional requirements contained in Section 6 of the Act set forth no jurisdictional requirements other than the claimant shall have the right within six months to file a petition with any Federal District Court of competent jurisdiction seeking a determination by the court of the equities involved.

Was there a written request for relief filed? The original claim involved in these proceedings (which is the original of Item 1 of the Designation of Record, on file with the Clerk of this Court, Record, pages 32 and 33) contains many forms of specific requests for relief. There are numerous invoices attached to said claim, all of which are itemized and specific as to their content. There is attached to said claim a document entitled "In the Matter of the Claim for Compensation of Edward L. Fogarty, Trustee of Inland Waterways, Inc." filed with the Claims Unit, Navy Audit Section, Bureau of Supplies and Accounts, Navy Department, entitled "Petition Requisition #120" dated the 23rd day of July, 1943, and a very detailed and extensive document

served personally on Commander Bergman of the U. S. Navy on May 17, 1944, and also sent to the Bureau of Supplies and Accounts of the United States Navy and the United States Attorney's office on May 17, 1944, which document set forth the claim of the Trustee, Edward L. Fogarty, against the Navy Department, Bureau of Supplies and Accounts (Rec. 32, 33), which is a definite request for relief and which was also filed in the District Court of the United States for the District of Minnesota, 5th Division, on May 18, 1944.

There is, therefore, no question but that a written request for relief, and in fact many written requests for relief, were filed with "the agency or department concerned" prior to August 14, 1945, and all were made a part of the claim so filed.

The Navy Department War Contracts Relief Board has often conceded that the precise form of a request for relief was not prescribed by Congress and that the exact wording is immaterial. This is evident from the typical decision of that Governmental Agency in *Milwaukee Engineering & Shipbuilding Co.*, Navy Department War Contracts Relief Board, December 9, 1947, Government Contracts Reporter, 4 C. C. F., Par. 60,452, wherein the Board states in part "The Board agrees with the claimant that the precise form of such a request was not prescribed by Congress, and the exact wording is immaterial."

The decision of the Court of Appeals, however (in line with the reasoning of the President, as evidenced by his regulations) to the effect that Congress intended to limit consideration to a request for relief from laws under the First War Powers Act, has no basis in fact and nowhere in the Act is there any language by which such a conclusion can be gleaned, and is against the expressed intention of Congress in passing the Lucas Act. (See Point IV of this Brief.)

An examination of the claim that was filed with the District Court on April 2, 1948 (Record, pages 32 and 33), setting forth the counterclaim of the trustee to the claim of the Government in the bankruptcy proceedings and the numerous billings and other exhibits attached to said claim, clearly indicate that *numerous* requests for relief were filed prior to August 14, 1945. The amount which may be due to the claimant is, of course, restricted to the amount which might have been allowed by the department or agency concerned and can only be determined after a hearing of this cause on its merits.

The Court of Claims in *Howard Industries, Inc.* v. *U. S.*, Court of Claims No. 48874 at page 10 of its decision, sets forth its conclusions in this connection as follows:

> "The requirement contained in Section 3 of the Lucas Act that claimants must have filed a written request for relief prior to August 14, 1945, merely means, we think, that claimants must be able to show that they had made timely (that is, prior to August 14, 1945) protest to the contracting agencies concerning the losses now sued on and so have given those agencies an opportunity to either grant or deny their claims. This the plaintiff has done by three letters referred to earlier in this decision."

II.

SECTIONS 204 AND 307 OF EXECUTIVE ORDER 9786, PRESUMABLY PROMULGATED PURSUANT TO PUBLIC LAW 657, 79TH CONGRESS, AUGUST 7, 1946, ARE IN DIRECT CONFLICT WITH THE PROVISIONS OF PUBLIC LAW 657 AND ARE THEREFORE INVALID AND CANNOT BE INVOKED AGAINST THE PETITIONER.

The recent expressions of Congress set out under Point IV of this Brief are proof of the fact that Sections 204 and 307 of Executive Order 9786 are contradictory to the intent and stated purpose of the Lucas Act. Our analysis

here, however, is made for the purpose of directly responding to the arguments heretofore made by the proponents of the propriety of the said Executive Order.

Section 204 of Executive Order 9786 reads as follows:

> "No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; *and no claim shall be considered if final action with respect thereto was taken on or before that date.*" (Italics ours.)

Section 2(a) of the Act provides in part that the Board, in arriving at a fair and equitable settlement of claims under this Act:

> "* * * shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C. Supp. IV, App. Sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C. Supp. IV, Sec. 101-125), *or similar legislation;* (2) relief granted under Section 201 of the First War Powers Act, 1941, or *otherwise;* and (3) relief proposed to be granted by any other department or agency under this Act." (Italics ours.)

This Section of the Act is followed by Section 3 which provides in part:

> "* * * *but a previous settlement under the First War Powers Act, 1941 or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.*"

The language of the Act in the two sections above quoted is clear and explicit. There is no ambiguity contained in the language thereof.

After reading Section 2(a) and 3 of the Act, we come to the consideration of the force and effect, if any, of Section 204 of Executive Order 9786. The language therein

contained "and no claim shall be considered if final action with respect thereto was taken on or before that date" (August 14, 1945) is clearly and diametrically opposed to the plain and explicit language of the Act above referred to.

The District Court referred to certain portions of committee sessions in the Senate and statements made in the Congressional Record which concern themselves in part with one of the purposes of the Act. The Act by its plain language does not and was not intended to limit the scope of the Act to an extension of the First War Powers Act, 1941. The statute under consideration by the court does not state that it is an extension of the First War Powers Act, 1941. And when the language of Section 3 of the Act is read, providing that a previous settlement shall not operate to preclude further relief, the inconsistency of Section 204 of Executive Order 9786 becomes all the more apparent.

The District Court and the Court of Appeals in these proceedings have held the Executive Order complained of, as being properly promulgated, by a resort to legislative history of the Lucas Act as an aid for the construction of that Act. These Courts ignore the plain and unambiguous language of the statute itself and look to extraneous sources to justify their conclusions.

The District Court and the Court of Appeals have sought to apply rules of construction to a clear and unambiguous act which is not subject to the type of statutory interpretation that we find in statutes which are not so clear and explicit, so as to justify the Executive Orders under discussion. The Courts consider those latter statutes ambiguous and, therefore, look to sources other than the language therein contained in order to ascertain the meaning thereof.

We can find no clearer or simpler statement of the law

than is found in 50 American Jurisprudence at page 204, reading from Paragraph 225:

> "A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory intrepretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

The above statement of the law is supported by numerous decisions both state and federal, and, typical of the holding of the cases in support of the contention, we refer the court to the case of *Browder* v. *The United States*, 312 U. S. 335, holding in essence that no single argument has more weight in statutory interpretation than a construction within the plain meaning of the words of the statute. To the same effect is the case of *Walker* v. *United States*, 83 Fed. 2d, page 103, in which the court said at page 106:

> "The determination of the construction of the meaning of congressional acts is a judicial function.

This function and duty is so entirely and purely judicial that it is beyond the power either of the executive (citing cases) to control.

"If the statutory meaning is clear, there is no place for rules which aid in ascertaining the meaning of the statute, and neither legislative nor executive construction nor both is of any aid or force. (Citing cases.)"

To the same effect is the case of *Osaka Shosen Kaisha Lines* v. *United States*, 300 U. S. 98, 81 L. Ed. 532, 57 S. Ct., 356 and the cases cited therein.

The District Court sustained by the Court of Appeals, nevertheless, seeks to narrow the purpose and intendments of the Act to the relief to be granted to the small group of contractors who had claims pending under Section 201 of the First War Powers Act of 1941 that were undetermined as of August 14, 1945. That this is a clear misconception of the purpose of the Act is made more apparent in the light of recent Congressional action referred to under Point IV of this Brief.

The rule of construction of unambiguous statutes as set forth in 50 American Jurisprudence, as hereinabove set forth, does not afford one the luxury of dwelling upon certain words or phrases that they can pluck here and there from the lips of individual legislators and thereby apply a narrow meaning for what was merely intended to be a discussion of one small part of the scope and purpose of particular legislation in an attempt to encompass the whole of the legislative will within the narrow confines of such expressions.

We have never encountered in all of our reading of law a regulation which so clearly is diametrically opposed to the plain language and intendments of a statute than we find in Sections 204 and 307 of Executive Order 9786.

There are many cases which hold that a regulation has no force when it is in conflict with the statute but we need

cite only two typical decisions to bring out an obvious rule of law. The case of *Union Trust Co. of Rochester* v. *United States*, 5 Fed. Supp. 259 was decided in the District Court of the Western District of New York on October 3, 1933 and affirmed by the Circuit Court of Appeals on April 2, 1934 in a decision in 70 Fed. 2nd 629. The petition for certiorari was denied by the Supreme Court of the United States in 293 U. S. 564. At page 261 of the case cited in the 5 Fed. Supp., the court states:

> "It is the contention of the Government that a regulation promulgated by the Internal Revenue Commissioner has the force of statute and limits recovery to that portion of the tax paid within 4 years preceding the filing of the claim * * *. The Commissioner of Internal Revenue was authorized to adopt the regulation to carry out these provisions of the Revenue Act. A regulation so adopted *may* have the force of statute. *It is self-evident that it has no such force when in conflict with statute.*" (Italics ours.)

To the same effect is *Manhattan General Equipment Company* v. *Commissioner*, 297 U. S. 129 at pages 134 and 135.

Goldsborough v. *United States*, 80 Federal Cases #5519; *Deming* v. *M. C. Claghorn*, 113 Federal 639, affirmed 186 U. S. 49; *Houghton* v. *Payne*, 194 U. S. 88 followed in *Smith* v. *Payne*, 194 U. S. 104; *Harris* v. *Bell*, 254 U. S. 103; *People ex rel. Chadwick* v. *Sergel*, 269 Ill. 219, 110 N. E. 124 and numerous other decisions, all hold that the erroneous conception of an executive department or agency as to the construction of a statute to whom Congress has entrusted its execution cannot bind the courts; that a court cannot lawfully renounce its judicial powers; and it is its duty to render a decision contrary to the construction and practice of the department or agency if satisfied that a correct determination of the question before it requires

such a contrary decision. We ask no more than that the court examine Sections 204 and 307 of Executive Order 9786 to determine whether or not said regulations, which were supposedly promulgated to carry out the purposes of Public Law 657, are not in direct conflict with the provisions of said Act as set forth in Sections 2(a) and 3 thereof. Briefly, the Act provides that relief granted irrespective of whether or not a previous settlement was made with the claimant on or before August 14, 1945. Section 204 of the Executive Order is in direct conflict in that it provides that no claim shall be considered if final action with respect thereto was taken on or before August 14, 1945. We do not quarrel with the argument that the Act authorized the President to promulgate regulations to implement the statute, but we must examine and inquire into the regulations promulgated in the light of the particular statute under consideration.

Certainly under the statute before the court the President would have the right to promulgate regulations which would provide for the manner, form and time for the filing of claims and other administrative rules and regulations with reference to the presentation of the claims. Nowhere in this Act is there any authorization giving the President or the board legislative powers. The authority referred to by the District Court in its memorandum such as *United States* v. *George S. Bush & Co.*, 310 U. S. 371 (Record, page 23) is ample authority for the contention we have just made because in that case the Act specifically gave the President absolute discretionary power. That case involved the Tariff Act of 1930. The Act provided in Paragraph 336 (c) that the President "shall by proclamation approve the rates of duty and charges in classification and in basis of value specified in any report of the commission under this section, *and if in his judgment* * * *." (Italics ours.)

The said Tariff Act gave the President absolute discretionary power and it is set out on page 380 of the decision above referred to:

> "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive charge of the existence of those facts."

So we see that the Tariff Act of 1930 grants unto the President the right to make determinations *solely upon "his judgment"*. The Act under consideration before us is not even remotely that type of legislation. Nowhere in the Act does Congress delegate any of its legislative functions to the President. The President only has the power to make regulations for the purpose of the orderly processing of the claims. That is clear from the language in the first section of the Act "Such departments and agencies are hereby authorized, in accordance with the regulations to be prescribed by the President within sixty days after the approval of this Act, to consider, adjust, and settle equitable claims of contractors, * * *."

The President cannot narrow the scope of a statute when Congress plainly has intended otherwise. *Newberger* v. *Commissioner*, 311 U. S. 83.

The case of *Work* v. *Rives*, 267 U. S. 175 cited by the District Court (Printed Record, page 21) states at page 182 thereof "It (the Act) vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable *and it made his decision conclusive and final.* Final against whom? Against the claimant. *He could not resort to court to review the Secretary's decision. This was expressly forbidden.*" In our case the contrary is true. The Act expressly provides for review by appeal to the courts. The case cited by the District

Court of *Grover* v. *Merritt Development Co.*, 47 Fed. Supp. 309 (Printed Record, page 21) sets forth on page 311 that the Act provided "*That the decision of the Secretary shall be conclusive and final.*" No such power is granted to the President or administrative body under our Act. We agree with the conclusion of the District Court that the discretion in issuing regulations depends to some extent on the subject matter and we agree with the citation in support of that proposition, *Hamilton* v. *Dillin*, found in 82 U. S. 528, 21 Wall. 73 (Record, page 24). But in that case the *statute* provided (page 92) "The President may, *in his discretion, license and permit commercial contracts* * * * *in such articles, and for such time, and by such persons as he, in his discretion* * * *" (Italics ours). "The extensive effect given to these clauses is undoubtedly largely due to the character of the instrument and that of the donee of the powers, to-wit: The legislature of the United States * * *." So we see that in that case there was unlimited discretion expressly granted to the President and that the legislator of the United States saw fit in that legislation to grant powers for which no comparable language can be found in the Act now before the court for consideration. It is not possible to compare the statute here before the court with the one under consideration in *Work* v. *Rives*, 267 U. S. 175 because as we have set forth in the quotation from the case at page 182, the Act in that proceeding made the Secretary's decision conclusive and final. There was no resort to the courts for review. "This was expressly forbidden." This is surely a far cry from the statute we have before us which allows appeal to any Federal Court of competent jurisdiction to enter an order directing the department of agency to settle the claim in accordance with the finding of the court.

59 Corpus Juris, page 952, states the law to be:

"The intention of the legislature is to be obtained

primarily from the language used in the statute. The court must impartially and without bias review the written words of the Act being aided in interpretation by the canons of construction. Where the language of a statute is plain and unambiguous there is no occasion for construction even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislator, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, or because the legislator did not use proper words to express its meaning, or the court would be assuming legislative authority."

This principle is well established and in a typical opinion the Court held in *Merritt* v. *Welsh*, 104 U. S. 694 at page 702:

"Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought first from the words they have used. If these are clear, we need go no further."

The District Court and the Circuit Court of Appeals for the Eighth Circuit have held that the Act limits recovery to First War Powers Act standards. The only reference to the First War Powers Act that stands by itself is a statement in the first paragraph of the Act that the work, etc. should have been furnished to a department or agency *which had been authorized to enter into contracts* and under Section 201 of the First War Powers Act. No issue is raised in this case that the contract of the petitioner with the Government is not within that class. The contract of the petitioner with the Government upon which claim was filed before the Board and which is here pending before the Court meets the requirements of that section of the

Act. The regulations, however, are not content with carrying out the express provisions of the Act in accordance with the language therein contained, but they seek to construe a statute where the statute itself, by reason of its unambiguity, is not subject to construction. The District Court and the Circuit Court of Appeals seem insistent that the Act before the Court is nothing more than an extension of the First War Powers Act and in justification of their position and interpretation insist that their conclusion is the only one tenable because they read the Act "in the light of its legislative background". (Italics ours.)

The language of all the courts is strong with regard to the rules regarding construction of statutes, and in each case it is the clear and unmistakable rule of law that the language of the Act itself must be followed by the courts where the statute is clear, uncontradictory and contains no ambiguities. Certainly, the courts below do not contend that the statute before the court for consideration is not clear, certain or unambiguous.

A reading of the first paragraph of the report the District Court has referred to (Record Page 21, House Report No. 2576, 79th Congress, 2nd Session) will reveal the following language:

> "*The purpose* of this bill is to authorize departments and agencies of the Government, in accordance with regulations to be prescribed by the President within 60 days after the date of approval of this act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses incurred between December 7, 1941 (later changed to Sept. 16, 1940) and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts." (Italics ours.)

It is significant to note that the date of December 7, 1941 above stated was changed to September 16, 1940, thus enlarging the relief to be granted.

Of course, the proposed legislation *also* gave relief to those contractors referred to in the next paragraph, but that obviously merely refers to only one particular group of aggrieved *contractors.*

The *purpose* as expressed in the first paragraph and the Act itself includes "*subcontractors and materialmen performing work or furnishing supplies or services to the Contractor or another subcontractor.*"

If rights were limited to those under the First War Powers Act these subcontractors or materialmen never could make a claim by virtue of the simple fact that there was no privity of contract with the Government and in fact, an attempt of a subcontractor or materialman to make a claim would be denied on that simple ground—lack of privity. *U. S.* v. *Blair, et al.*, 321 U. S. 730.

The First War Powers Act did not deal with the rights of subcontractors or materialmen to make a claim against the Government. The *expressed purpose* of Public Law 657 must be also construed in conjunction with the rights of those who are *expressly* to be benefited thereby—*subcontractors and materialmen.* Reliance of the District Court solely upon the next paragraph which concerns itself with "contractors" *only* would negative the first paragraph. This obviously was never intended.

Again, we respectfuliy call the court's attention to the fact that discussions before committees dealing with legislation initially proposed (but never enacted) and which emerges into a totally different piece of legislation, cannot be considered in the construction of the final enactment.

"Certainly the legislative history of a bill that was

not adopted cannot be resorted to to construe a bill that was."

Interstate Natural Gas Co. v. *Federal Power Commission*, 156 Fed. 2nd 949, 952, affirmed 331 U. S. 682.

If we are to seek legislative interpretation we most certainly cannot ignore the committee on the Judiciary of the Senate in submitting its formal committee report explanatory of the recent amendment to the Judicial Code (Sec. 37 of P. L. 773, 62 Stat. 869, Appendix, p. ....) at page 14 of the Senate Report, 1559, 80th Congress, 2nd Session, which states the following:

"Public Law 657 of the 79th Congress provides for the determination of war claims incurred without fault or negligence where any form of contract relief had been requested during the war and despite former administrative denial or settlement thereof."

Our contention is adequately supported by the finding of Judge Holtzoff in the case of *Warner Construction Co.* v. *Krug, et al.*, District Court of the United States for the District of Columbia, 80 Fed. Supp. 81 and also by Judge Albert L. Reeves in the case of *Stephens Brown, Inc.* v. *United States*, 81 Fed. Supp. 969, in which case the court stated:

"The contention of the defendant that the claim of May 8, 1944 was denied, and, therefore, under Executive Order 9786 the plaintiff is debarred the right of recovery is untenable. *Apparently the Executive Order was prepared in the light of the bill as originally introduced.* Paragraph 204 of said Order specifically denies relief where final action with respect to a claim was taken before August 14, 1945. The Executive Order in that regard contravenes the express provisions of the statute which specifically provides, 'but a previous settlement under the First War Powers Act,

1941 or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.'" (Italics ours.)

Judge Holtzoff, in *Warner* v. *Krug*, above cited, held:

"It is claimed by Government counsel it was the intention of the Congress in passing the Act of August 7, 1946, to do nothing more than continue the authority of Government agencies to settle contracts under the First War Powers Act.

"In support of this contention, Government counsel refers to various statements made by members of Congress on various occasions. Such statements, however, cannot contradict the unambiguous provision of the statute.

"It is important in this connection to note that when the bill was originally introduced it was much more narrow in its scope than the form in which it finally passed, and it may well be that some of the statements to which counsel refers had reference to the legislation in its original form. The bill as originally introduced contained a proviso that it should not be applicable to cases submitted under the First War Powers Act, which had been finally disposed of prior to August 14, 1945, and it is significant to observe that this proviso was stricken from the measure in the course of its passage and instead the provision which now appears as the last clause of Section 3 was inserted, affirmatively providing that a previous settlement under the earlier statute shall not operate to preclude further relief otherwise allowable under the Act.

"This legislative history throws a very significant light on the intent of Congress and accentuates the unambiguous meaning of the last clause of Section 3. It is obvious that it was the intention of Congress that a prior settlement under the earlier statute should not operate to preclude the granting of further relief under the 1946 Act.

"With the policy or expediency of this legislation, the Court has no concern. It is the duty of the Court

to enforce the statute as it is written, especially in view of the fact that it is unambiguous.

"In so far as Sections 204 or 307 of the rules and regulations promulgated under the statute may be inconsistent with Section 3 of the Act, these regulations must be deemed invalid, because it is elementary law that executive regulations promulgated for the purpose of carrying the statute into effect must be within the framework of the statute and may not be inconsistent with the statute.

"On the basis of these considerations, the motion of the defendant for summary judgment will be denied."

The question of legislative intent as discussed by the District Court in these proceedings, however, is clearly erroneous even if the rule of law were contrary to that which we have contended for. The statements of the trial court as to the legislative history which led the court to believe that the purpose of the Lucas Act as finally enacted was to do no more than extend the First War Powers Act are not accurate when a complete analysis is made of that legislative history.

An analysis of the record will indicate that when Senator Lucas *originally* introduced his bill, it apparently was little more than an amendment to Section 201 of the First War Powers Act. The same can be found set forth on page 1 of the Hearings on the War Contract Hardship Claims Act before a Committee of the Judiciary, United States Senate, 79th Congress, 2nd Session on S. 1477.

The bill as originally introduced read as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may authorize any department or agency of the Government (which prior to August 14, 1945, was authorized to enter into contracts and into amendments or modifications of contracts under section 201 of the First War Powers

Act, 1941), in accordance with regulations prescribed by the President, to enter into contracts and into amendments or modifications of contracts, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts, whenever the head of such department or agency makes a determination that such action is necessary to prevent a manifest injustice to a firm, corporation, or individual who has furnished supplies or services for the Government; Provided, That action taken pursuant to this section shall be confined to cases where such supplies or services have been so furnished between December 7, 1941 and August 14, 1945; and action may be taken under this section in such cases whether or not such supplies or services were furnished under a contract which has been completed and upon which final payment has been made; Provided further, That this section shall not be applicable to cases submitted under section 201 of the First War Powers Act, 1941, which have been finally disposed of under such section upon their merits prior to August 14, 1945. All Acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

"Sec. 2. No action shall be taken under this Act except with respect to claims or requests for action thereunder submitted to the department or agency of the Government concerned prior to July 1, 1946."

When that Act is compared with Section 201 of the First War Powers Act it will be noted that the only material difference in the language of the two Acts is that the words "facilitate the prosecution of the war" as used in Section 201 of the First War Powers Act are changed in Senate bill S. 1477, as *originally* introduced, to read "prevent a manifest injustice." By such a change, the objection of the War Department that hostilities had ceased and that no modification of the contract would aid the

further prosecution of a war that had ended was intended to be met so that relief would be granted, not upon the basis that such relief would facilitate the prosecution of the war, but upon the basis that such relief would prevent manifest injustice.

The legislative history of this Bill did not, however, stop at that point. That was only the beginning of the effort of Congress to provide relief for contractors who had suffered losses in the performance of contracts in aid of the war effort. Following the introduction of the original Bill an extended hearing was held, lasting two days. (Hearings before a Sub-Committee of the Committee on the Judiciary United States Senate, Seventy-Ninth Congress, Second Session on S. 1477, April 12 and 13, 1946), by a sub-committee of the committee on the judiciary of the Senate. In the course of that hearing many claimants appeared and presented their views; high officials of the Army, Navy, Maritime Commission, General Accounting Office and others appeared.

The variety of claims presented to the Committee and the differences of view expressed by those appearing before the Committee soon became manifest. One of the matters which provoked comment was the phrase "prevent manifest injustice" as used in the Bill originally introduced. Mr. Frank H. Weitzel, representing the General Accounting Office, appeared before the Committee and described that phrase as very vague and indefinite. The colloquy during his appearance before the Committee, beginning at page 27 of the Report is enlightening. We quote part of the statement of Mr. Weitzel on page 28 as follows:

> "Mr. Weitzel: I would question whether in one or two of the situations presented by Senator Lucas, the relief would be forthcoming if *this* bill should be enacted. There was some dispute in the War Depart-

ment in the case of the Hanover Woolen Co., and *even when they had the opportunity to grant relief under the First War Powers Act*, the Department decided not to grant that relief. And I would say, and I do not think anyone could say that the Department necessarily would grant relief in a case of that sort, *even under this bill.*

"As to the case of the Lake States Engineering Co., that is a construction contract, apparently, and the language of this bill says that the injustice must be to a firm, corporation or individual who has furnished supplies or services for the Government. In this respect, the language might not be broad enough to cover *certain cases such as these construction contracts.* I think the third case he mentioned, also, was a construction contract, which might be just as meritorious as those reached by the *present language* of the bill.

"If it is the intent to cover such contracts as construction contracts, the language should be clarified.

• • •

"In that connection, we might call attention to the fact that the First War Powers Act was not enacted as an aid to contractors. It was enacted as an aid to the prosecution of the war, and I note with interest that the War Department had taken the position that the relief granted must be essential to the prosecution of the war.

"In other words, if paying more under a contract to a contractor who had no further contracts with the Government were requested, the Department would feel that that was not an aid to the prosecution of the war. So, of course, this provision that you now have is much broader, in that the same action can now be taken if necessary to prevent a manifest injustice.

"The Chairman: That is an injustice to one who was called in to render a certain measure of service in furtherance of the war effort?

"Mr. Weitzel: Yes, Senator.

"Senator Revercomb: May I interrupt there to say that *I would not want to limit this in furtherance*

of the war, if the Government went into a contract under authority of law, and through no fault of the contractor *he lost money whether in furtherance of the war effort or peace effort, does not the same principle apply, of right?*

"If you hang it upon the question of furtherance of the war, you have put into it another element that may be difficult to prove.

"Mr. Weitzel: I think, too, if you give effect to the provisions of *this* bill, *you will exclude many* cases which might be thought meritorious by the contractors, but which were decided adversely to the contractors for this very reason, that the department thought that action would not be in furtherance of the war effort. Even though it might help the contractor and pull him out of bankruptcy, if it was not in furtherance of the war effort, the relief would not have been granted and *it could not be granted under this bill.*

"Senator Revercomb: *Where is the justice in making a distinction in a contract on the ground it is in furtherance of the war effort, if it is a contract entered into in a bona fide way?*

"Mr. Weitzel: I am not sure that there should be a distinction. I think that there was a distinction *during the war*, because of the fact that the contractor, if he kept in business and furnishing material to the Government, could help the war effort. That was the approach under the First War Powers Act. That may not be the *intended* approach under this bill, *but the language of the bill has that limitation*, that if a case was settled under the First War Powers Act, it could not be reopened now.

* * * * * *

"The authority proposed to be granted by the bill would extend to numerous departments and agencies of the Government, and it may be felt by the committee that *a better approach would be to authorize the presentation of claims for losses to a designated agency or tribunal for settlement upon an equitable*

basis, and Senator, *that need not be limited to claims for losses incurred in furtherance of the war effort;* that would be a question of policy for the committee to decide upon. The primary thing, though, is that a specific tribunal such as the Court of Claims would be given the authority in the legislation to hear and pass upon *equitable* claims of contractors *for losses incurred during the war period* on contracts with the Government." (Committee Report 27, 28, 29.)

On the second day of the hearing before the subcommittee the Chairman, at page 39, of the Report, stated:

> "I am just guessing at this thing as I visualize the picture, and I am not trying to decide it, and I do not think it is the province of this chairman to decide it. I am only trying to get the thing straightened out, to see whether or not the language of the Act *fits the case*. If it does not fit the case, then perhaps *we had better get legislation* that *will* fit such a case.
>
> * * * * * *
>
> "The Chairman: If, at the time the contractor sustained the loss, he was in the act of assisting in the prosecution of the war or the war effort, that is the spirit in my judgment of the law.
>
> "Mr. Wagner: That is true.
>
> "The Chairman: It may be that the language cuts off the spirit, I do not know. The spirit giveth life, they say, but the letter killeth. That is pretty true in this case."

So we see in regard to this legislation as is also the fact in many other bills that are introduced, that certain ideas are fostered to accomplish a specific and limited purpose but as the measure progresses in the ordinary channels of legislative discussion and investigation, the original thought is enlarged or modified so that when a final enactment is made, you have a combination of ideas which have been incorporated therein instead of the single thought of

purpose that the legislator who originally introduced the bill, had in mind.

It is obvious that there were certain injustices under the First War Powers Act which were originally sought to be remedied and there would be no hardship on the part of anyone to pick out a phrase here and there from the lips of certain senators or parties testifying before the committee on the hearings, to point out that views were expressed for the purpose of getting the committee to ultimately recommend the type of legislation that the individual proponent had in mind.

We have cited at length portions of the statements made before the committee which would indicate clearly that as the hearings progressed, the purpose and intention of the Act was liberalized so that in the language of the Chairman of the committee at page 44 of the Report "I think that those who meritoriously contributed to the war effort should not be permitted to lose".

A simple analysis of some of the features of the *original* Lucas bill introduced and Lucas Act Public Law 657 which was *ultimately* enacted will indicate the vast and sweeping material changes and modifications that were made between the Act initially proposed and that finally adopted by Congress.

The following are the important differences between the *original* Lucas Act as proposed in S. 1477 (which was never enacted) and S. 1477 which *finally* became Public Law 657:

(1) The *original bill* S. 1477 (never enacted) contained language which would have some comparison with Section 201 of the First War Powers Act, 1941, which permitted departments or agencies of the Government "to enter into contracts and into amendments or modification of contracts." Section 201 permits such action whenever

the President "deems such action would facilitate the prosecution of the war." The *original bill* S. 1477 (never enacted) permits such action "whenever the head of such department or agency makes a determination that such action is necessary to prevent a manifest injustice * * *."

The language of S. 1477 that was actually enacted as Public Law 657 is, however, entirely inconsistent with the foregoing concepts. Public Law 657 empowers the Government "to consider, adjust and settle equitable claims of contractors, including subcontractors and materialmen—for losses (not including diminution of anticipated profits) incurred without fault or negligence on their part in the performance of such contracts or subcontracts."

(2) The very statutory period stated in Section 1 of Public Law 657, that is, September 16, 1940 to August 14, 1945 is additional proof of the fact that it was not the intention of Congress to limit relief to First War Power claims only. The First War Powers Act, 1941, did not become law until *December 18, 1941.* Thus as to claims which were the result of work, labor or material between September 16, 1940 and December 18, 1941 and losses thereon, no relief could conceivably have been granted under the First War Powers Act, 1941. To interpret Public Law 657 so that claims would be limited to First War Powers Act, 1941 claims, would be to deny the benefits of the Act to persons furnishing work, labor and material during the first fifteen months of the statutory period defined in Public Law 657—that is, September 16, 1940 and December 18, 1941. To persist in the construction sought by the Court of Appeals in limiting relief to First War Powers Act, 1941 claims only, could result in only one thing—a rewriting of the Statute.

The *original bill* S. 1477 (never enacted) by its first proviso was confined to cases where such supplies or serv-

ices had been furnished between December 7, 1941 and August 14, 1945. The First War Powers Act, 1941, and Section 201, covered practically the same period of time specified in the original bill S. 1477 (never enacted).

Public Law 657 enlarged on this period of time so that contractors, subcontractors and materialmen who had completed and who had been paid for the performance of services or the furnishing of supplies between September 16, 1940 and December 7, 1941 would be entitled to relief under Public Law 657, where they would have *no* relief under the First War Powers Act, 1941 or under the provisions of the *original bill* S. 1477 (never enacted). This is further conclusive proof that it was intended by Congress in the enactment of Public Law 657 to grant relief to a great number of persons who could neither claim, nor be entitled to, relief under Section 201 of the First War Powers Act, 1941.

(3) Under Section 201 of the First War Powers Act, 1941 governmental departments and agencies were granted power to amend or modify contracts *made with the Government*. The undeviating practice of the Government had been to deal with claims or demands of subcontractors or materialmen on the legal ground of no privity of contract. Prior to the Contract Settlement Act of 1944 subcontractors and materialmen had no standing as claimants against the Government except as afforded them under the Miller Act which required the posting of performance or payment bonds, and which Act is not herein involved by reason of the fact that in the urgency of the war effort the requirements of such bonds were suspended.

The *original bill* S. 1477 (never enacted) in line with its seeming purpose merely to amend Section 201 of the First War Powers Act, thus makes no mention of subcontractors or materialmen.

However, the bill S. 1477 finally enacted as Public Law 657 *specifically includes subcontractors and materialmen.* In fact, the minutes of the Hearings before the Senate Subcommittee—and it should be borne in mind that only the provisions of the *original bill* S. 1477 (never enacted) were under consideration at the Hearings—contain a number of instances of subcontractors and materialmen, having no contract privity with the Government, who alleged they had suffered losses in carrying out their contracts, and who under the existing law, rules and procedures of the Government, including Section 201 of the First War Powers Act, 1941, and of the provisions of *original bill* S. 1477 (never enacted), would not have been entitled to relief. These subcontractors and materialmen urged the passage of legislation affording relief to them as well as to prime contractors and statements of their apparently meritorious claims were inserted into the record of the Senate Subcommittee (see Hearings, pp. 9-11, 45-46) of Hearings of the Committee on the Judiciary, 79th Congress, 2nd Session on S. 1477.

The bill S. 1477 finally enacted as Public Law 657, however, explicitly affords relief to subcontractors and materialmen, another clear evidence of the fact that Congress cannot have intended to limit claims only to claims made under the First War Powers Act, 1941.

(4) The *original bill* S. 1477 (never enacted) provided that "this section shall not be applicable to cases submitted under Section 201 of the First War Powers Act, 1941, which have been finally disposed of under such section upon their merits prior to August 14, 1945." Here again, however, the provisions of S. 1477 finally enacted as Public Law 657 are entirely different. *In fact, not only was the above quoted language of the original bill entirely eliminated from the bill which became law, but in its*

place there was substituted a diametrically opposite provision in Section 3 of Public Law 657, *i. e.*, that "a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944, shall not operate to preclude further relief otherwise allowable under this Act."

The express reference to the Contract Settlement Act of 1944, unmistakably clear as to meaning and intent, is most significant and fatal to the Government's contention that Public Law 657 was intended to cover only claims made specifically under the First War Powers Act, 1941.

Section 3 of Public Law 657 points out the fundamental weakness in the position of the District Court and the Court of Appeals. Let us consider a subcontractor or materialman who suffered overall net losses without fault or negligence in furnishing work, supplies or services during the statutory period between September 16, 1940 and August 14, 1945. Such a subcontractor or materialman, not being eligible to have his claim considered under the First War Powers Act, 1941, would have had no occasion to file, and in all probability would not have filed, a claim for First War Powers Act relief, that avenue of relief not being open to him. And yet, it is obvious under the clear-cut language and express provisions of Section 3 of Public Law 657 that if such a subcontractor or materialman had filed a written request for relief under the Contract Settlement Act of 1944 before V-J Day (August 14, 1945), such request would unquestionably qualify for relief under the provisions of Public Law 657. Otherwise, the provision for the filing of a written request for relief before V-J Day would have automatically barred all claims of subcontractors and materialmen and would have been clearly inconsistent with the plain intent of Congress to extend the benefits of the Act to them.

This language of the *original bill* S. 1477 (never enacted) herein referred to was entirely eliminated from the Act which ultimately became the law and in its place was inserted the provisions of Section 3 of Public Law 657 which expressly negatives the original intention.

Paragraph 204 of the Executive Order in question, obviously was written to cover provisions of the original bill which were clearly and specifically rejected by Congress and never passed.

The Executive Department attempts to make effective a provision which Congress expressly repudiated.

The United States Court of Appeals (D. C. Cir.) in *Border Pipe Line Co.* v. *Federal Power Commission*, 171 Fed. 2nd 149, 152 (Nov. 22, 1948) holds: "We cannot write into an Act of Congress a provision which Congress affirmatively omitted."

The limitations set forth in the provisions of Executive Order 9786 apparently were drafted on the basis of the Act as *originally* introduced and are clearly not regulations covering the Act in its final form. Those regulations under the guise of being promulgated for the purpose of administering the Act limits restrictions and nullifies the clear, unmistakable, unambiguous language, spirit and purpose which is set forth in the legislation by virtue of which the petitioner has sought this remedy.

In the case of *Zazove* v. *U. S.*, 162 Fed. 2nd 443, the court declared the regulations under consideration were invalid and states at page 444:

> "Nothing is said *in the statute* about equalizing the sum over the life expectancy of the beneficiary. The *regulation* does that. In other words; the regulation sets up a formula different than that prescribed by Congress. The Veterans Administration may by regulation carry out the provisions which Congress

lays down in the Statute, but it may not *alter* the provisions prescribed by Congress. Congress declares the law. The administration carries it out. (Citing authorities.)"

At page 446, the court states:

"If Congress chose to be generous, we know of no rule of law that authorizes the Veterans Administration to inaugurate an economy program. Even if Congress passed the Act unwisely, we know of no authority in law that authorizes the Veterans Administration, or even the courts, to correct it. Congress is the judge of its own wisdom limited only by the Constitution. The generosity of Congress to Veterans has never been admitted, officially, to be unwise. The language Congress used was plain. The regulations distorted the language."

(5) The *original bill* S. 1477 (never enacted) contained no provision for a judicial proceeding. It provided merely an additional grant of administrative power to amend or modify contracts without consideration. The amendment or modification of a contract under the First War Powers Act, 1941, was discretionary with the Government department or agency concerned. *Its administrative decision was final and not subject to judicial review.*

Not so S. 1477 finally enacted as Public Law 657. The power granted by that Act, *i. e.*, the power to consider, adjust and settle upon an equitable basis claims of contractors, subcontractors and materialmen for losses suffered is obviously quasi-judicial in nature. The test was no longer to be whether to grant relief would facilitate the prosecution of the war, but rather whether the claim was an equitable one for losses incurred without fault or negligence.

Such being the grant of power, Congress provided a judicial procedure for the enforcement of the right and

benefit conferred by the statute. Should the claimant be dissatisfied with the decision of the department or agency initially processing his claim, he is given the right by Section 6 of the statute to bring a plenary suit in the Federal Court (and, by amendment of the statute, in the Court of Claims) to try out *de novo* before that court, sitting as a court of equity, "the equities involved in such claim." From the decision of that court either party may appeal as in other equity cases. *Warner Construction Co.* v. *Krug*, 80 Fed. Supp. 81.

(6) Under Section 201 of the First War Powers Act, 1941, the Governmental agency or department concerned could and would in an appropriate case agree to an amendment or modification of an existing contract without regard to whether the contractor had made overall net profits on other Government contracts. The only test in cases "without consideration," was whether to grant the relief requested was necessary to facilitate the prosecution of the war. Consistent with this practice, the *original bill* S. 1477 (never enacted), contains no provision limiting the amount of relief which a Government department or agency may award by an amendment or modification of a contract.

The bill S. 1477 finally enacted as Public Law 657, however, in Section 2 specifically limits relief to the contractor's, subcontractor's or materialman's overall *net losses* on all war contracts or subcontracts with the Government during the statutory period, September 16, 1940 to August 14, 1945.

As further proof that Public Law 657 is not a mere amendment or extension of Section 201 of the First War Powers Act, 1941, Section 2 of Public Law 657 requires the Governmental department or agency also to take into consideration action taken under (1) the Renegotiation Act (50 U. S. C. A. Appendix 1191), the Contract Settle-

ment Act of 1944 (41 U. S. C. A. 101-125), *or similar legislation;* (2) Section 201 of the First War Powers Act, 1941; and (3) "relief proposed to be granted by any other department or agency *under this Act.*" (Emphasis added.) In other words, Congress explicitly recognized that *"this Act" (Public Law 657) is a separate and distinct Act and is different from and not merely an amendment or adjunct of Section 201 of the First War Power Act, 1941.* A similar Congressional discrimination between relief under the First War Powers Act, 1941, and "relief otherwise allowable under *this* Act" (emphasis added) appears in Section 3 of the statute.

The questionable propriety of the practice of resorting to legislative history where we have unambiguous enactment has been recognized by Mr. Justice Jackson in an article entitled "The Meaning of Statutes: What Congress Says", appearing in 34 American Bar Association Journal 535 in which he stated:

> "I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. * * *
>
> "And, after all, should a statute mean to a Court what was in the minds but not put into the words of the men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it."

The outstanding factor in the legislative history of the Lucas Act is the difference in the language of that Act as it was originally introduced to Congress, and the Act that was ultimately enacted.

The wisdom in the observations of Mr. Justice Jackson above referred to becomes apparent in the light of recent

Congressional Action which we have discussed under Point IV of this brief.

III.

THE SETTLEMENT AGREEMENT OF FEBRUARY 20, 1945 IS NO BAR TO PETITIONER'S CLAIM UNDER PUBLIC LAW 657.

The consideration by the District Court of the effect of the Settlement Agreement is again based not upon any language of the Act itself but upon other considerations.

The District Court again has failed to read the simple unambiguous language of the statute and it is the Court's observation (Rec. p. 28): "The legislative history is barren of any suggestion that a binding and valid compromise, resulting from negotiations of the interested parties supported by a consideration on both sides followed by an exchange of releases, may be disregarded by claimants to the gratuity extended to the Act of August 7, 1946." (Lucas Act.)

Judge Holtzoff in *Warner Construction Co.* v. *Krug*, 80 Fed. Supp. 81, effectively deals with this contention as follows:

> "The Government contends that this action does not apply because the plaintiff's claim had been adjusted and settled under the First War Powers Act, 1941. This adjustment and settlement being embodied in an amendatory contract between the plaintiff and the Government. This amendatory contract contains a general relief, running from the plaintiff to the Government.
>
> "Ordinarily, such a settlement, and particularly such a general release, would necessarily preclude the assertion of claims for any additional payments under the contract to which the settlement related.
>
> "Section 3 of the Act of August 7, 1946, however, contains the following provision:
>
> 'A previous settlement under the First War

Powers Act of 1941, or under the Contract Settlement Act of 1944, shall not operate to preclude further relief otherwise allowable under this Act.'

"It is contended by the plaintiff that this provision waives the definitive effect of the previous settlement and waives the rights of the Government under the general release which it had received.

"Obviously the Congress has the right to waive a release in behalf of the government and it would seem under a liberal construction of this provision that this is just what the Congress did.

"The Government claims, however, that the term 'settlement' should be limited to a unilateral adjustment of a claim made by a government agency, and does not extend to agreements embodied in a contract, or a settlement embodied in a contract.

"In other words, the Government claims that if the administrative agency had settled the claim, that settlement would not preclude further relief. But because the settlement was embodied in the bilateral contract or agreement, which included a release, that such a settlement is not waived by the Act of Congress.

"The Court is unable to find a tenable basis for the Government's contention. The statute is clear and unambiguous. It provides that a previous settlement under the prior act shall not operate to preclude further relief otherwise allowable under the Act.

"A settlement consummated by bilateral agreement is just as much a settlement as a unilateral adjustment or allowance of a claim. The term 'Settlement' covers both methods of adjusting a claim.

"It is obvious to the Court that it was the intention of the Congress, by the Act of August 7, 1946, to authorize Government agencies to make adjustments of claims in addition to any adjustment which had been previously made. Further, a court review was provided for in the 1946 Act, which had not been provided for in the original First War Powers Act."

The case of *Illinois Surety Co. v. United States*, 240 U. S. 214 cited by the District Court (Rec. p. 28) is not

at variance, nor does it contradict any of the contentions of the plaintiff. Every case that is cited to sustain a legal principle must be analyzed to ascertain the problem that the court there had before it, if we are to understand the import of the language. The above cited case involved the determination as to when the time to bring an action was to commence to run (P. 217). The action was to "be commenced within one year after the performance and final settlement of said contract, and not later."

The statute there being considered, involving the element of the determination of the lapse of time, necessarily involved judicial construction of when that time commenced to run. The purpose of the language of that act as set out on page 218 was to allow the Government to determine the status of its account with the contractor. That the language there used was not intended to denote payment is clear from the following language on page 218:

> "Indeed, if an amount were found to be due *from* the *contractor, and he was insolvent*, there might be no *payment*, and, if *payment* were essential, *there would be no date* from which the time for the bringing of the creditors' action could be *computed*." (Italics ours.)

The Court in that case recognizing the fact that the problem of interpreting language, was to apply its determination so as to give effect to the Act, and realizing that in other statutes, that the same or similar language would have a different meaning, says at page 221:

> "We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other sense, or in the sense of 'payment' ".

The statute does not provide, nor are there any combinations of words or phrases that can give rise to any such

conclusions, that the previous settlement referred to in the Act must have had new circumstances arising subsequent to the settlement to afford further relief.

It is quite apparent that the word "settlement" in the Lucas Act was not used in the narrow sense contended for by the respondent.

Section 3 speaks of settlements under the First War Powers Act, 1941. The only settlements authorized by that Act and the Executive Orders supplementing it were settlements entered into by agreement.

Section 201 of the First War Powers Act, 1941 provides:

> "The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort * * * to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon * * * whenever he deems such action would facilitate the prosecution of the war." 50 U. S. C. A. § 611, p. 241.

Pursuant thereto, the President, on December 27, 1941, promulgated Executive Order 9001, providing in part as follows:

> "3. The War Department, the Navy Department, and the United States Maritime Commission may *by agreement* modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into *agreements* with contractors and/or obligors, modifying or releasing accrued obligations of any sort, * * * whenever in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated." (Italics added.)

The only settlements that were authorized by these Executive Orders were those entered into by *agreement*. The so-called war agencies had no authority to make settlements in any other way. No settlement agreement was made without first obtaining a settlement "agreement" from the contractor under which the contractor accepted the adjustment as a complete and final one. There was no such thing as a unilateral settlement under the First War Powers Act, 1941.

The Contract Settlement Act of 1944 referred to in Section 3 of the Lucas Act provides:

> "Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods."

We must take the words in their ordinary meaning. "Previously" obviously means something that has gone on before. The word "settle" according to the Webster's 20th Century Dictionary, Unabridged Edition, means—to place in a fixed or permanent position; to establish; to determine as something which is exposed to doubt or question; to free from uncertainty or wavering; to make firm, sure, or consistent; to adjust, as something in discussion or controversy; to bring to a conclusion; to arrive; to furnish; to close up; as, to settle a dispute by agreement, compromise or force; to make sure or certain, or to make secure by a legal or formal process or act; to liquidate; to balance; to pay; to adjust. To become fixed or permanent; to assume a lasting form or condition. The word has an established legal meaning in that it implies a permanent condition. Black's Law Dictionary defines the word "settlement" with reference to contracts as follows: "Adjustment or liquidation of mutual accounts; the act by

which parties who have been dealing together arrange their accounts and strike a balance. *Also full and final payment or discharge of an account.*" *Coleman v. Ferrar,* 112 Missouri 54 at 70, 20 S. W. 441. So again we find that the Courts below are belaboring words by saying that the plain language "previous settlement" does not mean what it says, but means a settlement that does not dispose of the controversy; but means a settlement which leaves something pending; but means a settlement of only *part* of a claim, leaving another part open for discussion, or better yet, a settlement which is not a settlement but is based upon subsequently arising facts. That is not the general or legal concept of a settlement.

The reading into the Act of something that is not there is apparent in the *United Concrete Form Products Company, Inc.* decision of the Navy Department Board, Commerce Clearing House, 4 C. C. F. Par. 60,449, referred to in the District Court's memorandum (Rec., p. 24) in which the argument is made, that in order for a claim to be otherwise allowable, the right to further relief under the First War Powers Act as to certain portions of the claim would have to be specifically reserved for further consideration by the terms of the settlement itself, or a new request for relief, upon which final action was not taken before August 14, 1945 would have to be submitted.

There is not one word in the Act to support such a conclusion. The Act was designed to compensate contractors and subcontractors for the net losses incurred by them without fault or negligence on their part in the performance of all of their Government contracts. The regulations recognize this fact by requiring that the claimant set forth the contract price, the cost of performance, the amount received and the net loss or profit on all of the Government contracts of the claimant. The claim is then restricted only to the net loss on all of the contracts.

The contention that for a claim to be otherwise allowable after a settlement had been made, the right to further relief would have to be specifically reserved for further consideration by the terms of the settlement itself, is a construction of language opposed to the plain language in the Act itself. The definitions of the word "settlement" as we have hereinabove set forth are the plain and ordinary meaning of the word. The legal definition as given by Black "* * * *full and final payment or discharge of an account*" is diametrically opposed to the definition by the Courts below that a previous settlement would reserve for further consideration undisposed-of items. A settlement disposes of the controversy, fully, completely and finally. If the agreement does not do so it is not a settlement. It is an agreement covering part of the controversy which is not settled until all of the issues have been fully agreed upon and allowed.

The further contention that the phrase "previous settlement" embraces the concept that after the settlement shall have been completed that a new request for relief must have been filed and pending prior to August 14, 1945, is again not based upon any language of the Act. It is, indeed, such a strange construction that no attempt is made anywhere to justify it except to state that the statute contains no authority for the Government to revive a request for relief and, therefore, they assume that a second request for relief would have had to be filed in apt time to come within Section 3, even though a previous settlement had been effected.

The plain and unambiguous language of the Act makes it clear that it was the intention of Congress to give relief for losses with respect to which a written request for relief was filed on or before August 14, 1945. If such losses were previously settled and disposed of it is but further

evidence of the legislative intention that such previous settlement with respect to which a written request for relief was filed and which still resulted in a loss to the contractor shall not operate to preclude further relief otherwise allowable under this Act. That is the plain and unmistakable language of the statute. It is unambiguous. The attempt to nullify the will of Congress by executive legislation (which power to legislate was not granted in this Act) should not prevail against the clear and obvious intendments of Congress.

If the word "settlement" means "full and final payment or discharge of an account" that is the exact definition and construction that we must give to the release of the trustee. There is no question but that it was given in exchange for and as a result of "full and final payment or discharge of an account". There was no doubt that the settlement did not reimburse the estate for the amount that it contended was due. The settlement moneys which were received left the estate with a large net loss on its Government contracts.

The legislature has seen fit to allow contractors and subcontractors to obtain reimbursement for the net losses on their Government contracts. That such relief is to be granted in this case is apparent *by the clear statement that a previous settlement shall not operate to preclude relief otherwise allowable under the Act.* It is not for the President or any other administrative agency to enact new legislation by promulgating rules which emasculate the purposes of the Act.

Section 204 of the Executive Orders "* * * and no claims shall be considered if final action with respect thereto was taken on or before that date" (August 14, 1945) is diametrically opposed to the language of Section 3 of the Act which provides that a previous settlement shall

not operate to preclude further relief *otherwise allowable under the Act.*

The words of the legislature must be taken in their plain and literal meaning. The plain and obvious language thereof should not be tortured so that the clear and stated word becomes nullified by construction that involves absurdity or contradiction. The statute, being clear and unambiguous, is not subject to construction.

The petitioner does not contend that the settlement agreement in this case was not a proper and binding document at the time it was entered into.

The petitioner does contend, however, that the settlement agreement which resulted in the giving of the release, left the petitioner (and the bankrupt estate which he represented as Trustee) with a large and substantial loss on the contracts that the bankrupt had entered into with the Government.

Congress had seen fit to reimburse a contractor (who without his fault or negligence has sustained a loss in his Government contracts) to recover the amount of his net loss, and to that end set out in the Lucas Act a provision that a previous settlement shall not operate to preclude relief otherwise allowable under that Act (Section 3 of the Lucas Act).

The settlement agreement involved in these proceedings comes squarely within the intention of Congress in this respect.

The Supplemental Agreement of February 20, 1945, that is referred to by Respondent was entered into on behalf of the Government only pursuant to such authority which had been granted to Governmental Departments—and that authority was found under the First War Powers Act, 1941 and the Contract Settlement Act, 1944.

The Settlement Agreement (Rec. p. 9) was made par-

suant to Section 27 of the Bankruptcy Act (U. S. Code, Title 11, Chapter 4, Section 50) which provides for the manner in which courts of bankruptcy can pass upon a compromise of claims, and is intended to supply a summary and inexpensive way of settling questions arising in the administration of bankrupt estates and for the purpose of determining dubious issues. (Collier on Bankruptcy, 14th Ed., Vol. 2, Page 1082, par. 27.02.)

Section 27 of the Act above referred to states:

> "The Receiver or Trustee may, with the approval of the Court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

Collier on Bankruptcy, 14th Ed., Vol. 2, Page 1090, par. 27.04, states the law to be:

> "The approval of the Court of a compromise is not a judicial determination of any legal defenses made by the other party to the controversy * * *."

That a settlement agreement pursuant to Section 27 of the Bankruptcy Act is merely a contract between the parties which was approved by the Court is further evident from the holding in, *in re Sobod, Inc.*, 25 Fed. Supp. 344, District Court S. D. N. Y., wherein the Court states at page 345:

> "The Trustee in Bankruptcy had of course the remedy of plenary suit against the respondents to enforce the compromise. *Or he might have elected to rescind the compromise because of the default and to go ahead with his suit on the original claim.*" (Italics ours.)

That a settlement under Section 27 of the Bankruptcy Act is *not* an adjudication on the merits, but only ratification of an agreement between the parties, is further evident from the statement of the Court in Petition of Stuart,

et al., In re National Artificial Silk Co., 272 Fed. 938 (C. A. 6th Circuit) wherein the Court states at page 941:

> "In determining the advisability of compromise, the Trustee and the Court had the right to take into account the uncertainty and cost of litigation, as well as the existence of unsettled questions of liability." (Citing cases.)

A reading of Section 27 of the Bankruptcy Act indicates that it is the *receiver* or *trustee* who is to compromise the controversy. The court merely approves the agreement or disapproves it as the case may be. The Order of the court pursuant to the Petition of the trustee for the approval of a compromise of the controversy is tantamount to nothing more than a consent decree.

A consent decree is not a judicial determination of the rights of the parties. It is not purport to represent the judgment of the court, but merely records the agreement of the parties. *Lefor* v. *Jones*, 338 Ill. App. 173; 87 N. E. 2nd 48 (and cases cited).

The case of *Hodgson* v. *Vroom*, 266 F. 267, C. A. (2nd Cir.) states the law to be at page 268:

> "The distinction between a decree in common form and a consent decree is the difference between a consent to submit a case to the court for decision and a consent as to what the decision shall be. When there is a consent as to what the decision shall be, the decree is a 'mere agreement of the parties under the sanction of the court, and is to be interpreted as an agreement.'"

The document of February 20, 1945, is entitled a "Supplemental Contract." It is obvious that the words "previous settlement" under the First War Powers Act, 1941, of the Contract Settlement Act of 1944 as used in Section

3 of Public Law 657 did not refer to a unilateral administrative determination but bilateral agreements. The very language of Section 201 of the First War Powers Act, 1941, empowers the Governmental agencies involved to "enter into contracts and into amendments or modifications of contracts" and Executive Order 9001 provided "Amendments and modifications of contracts may be with or without consideration * * *."

Settlements under Section 201 of the First War Powers Act, 1941, and Executive Order 9001 invariably took the form of formal "Supplemental Contracts," *which were bilaterally executed* by both the claimant and the Government. *Howard Industries, Inc.* v. *United States,* Court of Claims, No. 48874, states at the bottom of Page 6 of its decision, with reference to the First War Powers Act, 1941, and regulations under Executive Order 9001: "This regulation clearly authorized settlements by bilateral agreements." To the same effect is the holding in *Warner Construction Co.* v. *Krug,* 80 F. Supp. 81.

Indeed, a bilateral agreement seems the only method of settlement authorized by Section 201 of the First War Powers Act, 1941.

The Contract Settlement Act of 1944 (41 U. S. C. A. 106(c)) provides:

> "Any contracting agency may settle all or any part of any termination claim under any war contract by *agreement with the war contractor,* or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods." (Italics ours.)

A bilateral agreement is again indicated and invariably Settlement Agreements under the Contract Settlement Act of 1944 took the form of formal "Supplemental Contracts" formally executed by and between both the claimant and the Government.

Certainly the "Settlement Contract" involved here was executed on behalf of the Government by virtue of some authority granted to the agencies on its behalf. We repeat—that authority is to be found only in the First War Powers Act, 1941, or the Contract Settlement Act of 1944.

The Navy Procurement Directive of July 7, 1943 (Commerce Clearing House, Government Contracts Reporter, Vol. 1, P. 2272)[1] in discussing the scope and authority granted to the Navy Department under the First War Powers Act, 1941, and Executive Order 9001 indicates clearly that the only authority for the Government in entering into the "Supplemental Contract" of February 20, 1945, was the authority granted under the said First War Powers Act, 1941, and Executive Order 9001. The aforesaid "Settlement Contract" was clearly one made

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1. I. INTRODUCTORY AND DEFINITIONS.

1. In the making of amendments and modifications of contracts and agreements under the First War Powers Act 1941 and Executive Order 9001, the general principles and procedure established by this directive shall be followed. * * *

2(a) For the purpose of easy reference in this directive, the contracts and agreements to which the United States is a party are divided into (i) completed contracts and (ii) open contracts. A "completed contract" is a contract or agreement under which all work, which is required to be done to entitle the private contractor to final payment, has been done. All other contracts and agreements are termed "open contracts."

(b) Amendments and modifications may be divided into (i) those accompanied by substantial consideration to the United States (hereinafter referred to as "with consideration") and (ii) those not accompanied by such substantial consideration (hereinafter referred to as "without consideration").

(c) The term "consideration," as used herein, means performance by the contractor in excess of the performance required under the contract from the contractor or the giving up by the contractor of rights or benefits to which the contractor is entitled under the terms of the contract. The descriptive adjective "substantial" has been used in paragraph 2(b) to exclude from the designation "with consideration" the cases in which the consideration is more formal than real. In other words, before an amendment or modification can be termed "with consideration," the consideration must have some substance and reality. It will be re-

"with consideration" by virtue of the fact that the trustee had on record and had asserted a substantial counterclaim against the Government as is indicated in the copy thereof attached to and made a part of the Exhibit referred to at Page 32 of the Printed Record and again set forth in the "Settlement Contract" itself as it appears in the second paragraph on Page 13 of the printed record.

We especially call the Court's attention to that portion of the Procurement directive set forth in the footnote 1 set out below, viz.: "It will be recalled that, prior to the First War Powers Act, 1941, and Executive Order 9001, contracting officers had no authority to amend contracts or agreements * * *." Following this language are exclusions not of the type covered by the Settlement Agreement.

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called that, prior to the First War Powers Act, 1941, and Executive Order 9001, contracting officers had no authority to amend contracts or agreements except in cases where tangible and actual benefits (*i. e.*, substantial consideration) would pass to the United States, *e. g.*, decreases in contract prices, longer guaranty periods, earlier deliveries, work in excess of that required under the contracts, etc. Such amendment and modifications, which could have been so made prior to the First War Powers Act, 1941, and Executive Order 9001, are the ones included within the designation "with consideration."

II. COMPLETED CONTRACTS.

3. Except for change orders and other modifications made or to be made pursuant to the provisions of the contract, contracting officers shall not amend or modify completed contracts, unless authorized or directed so to do by the Office of Procurement and Material. If the proposed amendment or modification to a completed contract is supported by consideration and is not to be made pursuant to the provisions of the completed contract a new contract should normally be made. If the making of a new contract is not practicable (whether for lack of consideration or otherwise), the application for an amendment or modification should be referred for action in accordance with the procedure set forth in paragraphs 6 and 7.

III. OPEN CONTRACTS.

4. Amendments and modifications with consideration of open contracts may be made by contracting officers to the same extent and in the same manner as original contracts are made by such contracting officers.

Also please note that the parties to the agreement of February 20, 1945, on behalf of the Government are solely the Navy Department Officers of the Procurement & Material Division of the Finance Division, the Contracting Officer and the Purchasing Officers of the proper Navy Departments—which is the authority contemplated under the First War Powers Act, 1941.

That the petitioner has a meritorious claim is self evident from the fact that pursuant to the settlement agreement (Rec. P. 9) the Government paid the petitioner a sum approximating $15,000.00.

The District Court states in its opinion (Rec. P. 17):

> "These parties entered into an agreement on February 20, 1945, compromising and settling this controversy, and the agreement was authorized and approved by this Court."

The Court goes on (Rec. P. 27):

> "On February 20, 1945, the date the settlement agreement was executed, the First War Powers Act was in effect. The petitioner presented his claims for money alleged due the contractor at the time. Presumably all claims were presented and considered. If the petitioner had any claims for losses naturally he then would have made them known. In any event a settlement was made and the petitioner, as a trustee in bankruptcy, on behalf of the contractor and with the authority and approval of the court executed an instrument in writing releasing and forever discharging the Government * * *."

What the Courts below have overlooked is the fact that the petitioner could not have presented a claim for losses at the time of the settlement agreement on February 20, 1945 (when the First War Powers Act, 1941, was in effect). The petitioner at that time could not have asserted a "claim for loss" which was within the contemplation of

Public Law 657, Lucas Act, because Public Law 657 was not enacted into law until a year and a half later—August 7, 1946.

The parties hereto compromised and settled their controversy, the respondent proceeding under the authority of the First War Powers Act, 1941, and the petitioner as a trustee in bankruptcy sought and obtained the approval of the District Court to execute the agreement on behalf of the bankrupt estate. There were no hearings on the merits of the controversy; there was no evidence presented to the Court for determination; the agreement was entered into solely between the parties who compromised and settled their differences outside of the Courts.

The United States Court of Claims in *Howard Industries, Inc.* v. *United States*, No. 48874, decided April 4, 1949, holds at the bottom page 8 of its opinion:

> "Paragraph 204 of the Executive Order is merely a paraphrasing of the provision so *omitted* and is in direct conflict with the wording of the Lucas Act as enacted and with the intent revealed in its legislative history. *Our conclusion is contrary to the decision of the District Court in the case of Fogarty* v. *United States*, 80 Fed. Supp. 90, *which case we have examined with care, but with which we find ourselves unable to agree.*" (Emphasis ours.)

IV.

RECENT CONGRESSIONAL ACTION CLEARLY INDICATES THAT THE OPINIONS OF THE COURTS BELOW, FROM WHICH THIS APPEAL IS TAKEN, ARE ERRONEOUS AS BEING BASED UPON A MISINTERPRETATION OF PUBLIC LAW 657.

Recent Congressional action in passing two Amendments to the Lucas Act, H. R. 3436 and S. 3906, clarified the issues involved in these proceedings so that there is no further opportunity for debate on what the Congressional intent was in passing the Lucas Act.

The Senate report to the 81st Congress, 2nd Session Senate (Calendar No. 1612, Report No. 1632), beginning with the Statement on Page 2 thereof, states:

"STATEMENT

"As has been indicated above, the purpose of H. R. 3436 and S. 873 is to amend Public Law 637 of the Seventy-ninth Congress so as to relieve contractors who, it is felt, have been deprived of the intended relief under that act *because of the restrictive administration* of the latter.

"The original Lucas Act became law principally because of the inadequacy of the contract relief provisions of the First War Powers Act of 1941 (sec. 201), act of December 18, 1941 (58 Stat. 839), by which it was provided that—

> the President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems that such action would facilitate the prosecution of the war.

"Certain of the war agencies refused to make further adjustments of claims on the ground that there was no longer a basis for the First War Powers Act relief provisions, since an adjustment could not "facilitate the prosecution of the war," the war having been ended for that purpose.

"In this state of affairs, the Congress enacted the Lucas Act. As first introduced, this act was clearly intended to offer a continuing ground for relief under the First War Powers Act, even though the adjustment of the contract could no longer "facilitate the prosecution of the war." *However, it was decided to change the language,* so that the act, when finally enacted, read, in part:

> * * * to settle equitable claims of contractors * * * for losses (not including diminution of anticipated profits) incurred * * * without fault or negligence on their part in the performance of such contracts * * *.

"Further, the bill as introduced originally contained the clause:

> This section shall not be applicable to cases submitted under section 201 of the First War Powers Act, 1941, which have been disposed of under such section on their merits prior to August 14, 1945.

"As finally passed, however, that language was entirely omitted so as not to make a previous determination conclusive and, indeed, as enacted the Lucas Act provided in section 3:

> a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act, 1944, shall not operate to preclude further relief otherwise allowable under this act.

"*The present proposed amendments to the Lucas Act stem largely from erroneous and restrictive interpretation of that act.* It has been contended on the part of the Government that the Lucas Act was intended to be a mere continuation of the First War Powers Act in favor of these contractors. On the other hand, the

critics of the Executive order and the proponents of the proposed legislation have claimed that the Lucas Act, in view of the language cited in the preceding paragraph, was intended to give a much broader basis of relief than that offered by the First War Powers Act." * * *

Continuing on Page 4 of the report, the Statement goes on:

"It is a fact nowhere denied that very little relief has been afforded aggrieved contractors under the Lucas Act. It was not denied by the Government that, out of 290 petitions filed, only one contractor had actually been paid. Some of the contractors were denied relief because they had an over-all net gain although sustaining a net loss on one contract. Another major cause of denial was the narrow administrative (and sometimes judicial) interpretation placed upon the act. The Government in opposing any amendment of the present act, alleges that this is a correct interpretation of the act. The proponents of amendment allege that those interpretations are in direct contravention of the act. These arguments are sometimes stated in terms of the act itself, sometimes in terms of Executive Order 9787 issued, supposedly, to carry it out.

"The principal sections of the Executive order challenged as an encroachment upon the congressional intent expressed in the Lucas Act are sections 204 and 307. Section 201 provided that no claim should be considered unless filed with a war agency in accordance with the act and the regulations on or before February 7, 1947. Section 204 provided that—

> No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request with respect thereto was filed with such war agency on or before August 14, 1945, and no claim shall be considered if final action with respect thereto was taken on or before that date.

"As will be hereafter noted and discussed, it is alleged

that section 204 is in contravention of section 3 of the Lucas Act, which provides that—

> a previous settlement under the First War Powers Act, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this act.

"On the other hand, it is alleged by the defenders of the Executive order that the supposed derogation from the Lucas Act is no derogation in fact, and that allegations to the contrary arise from a misinterpretation of the intent of the Lucas Act, and from misintepretation of the words "settlement" and "otherwise allowable."

"The 'written request' demanded by both the act and section 204 of the Executive order has been held by the agencies to mean a written request for 'money' relief, although no such limitation is in the Lucas Act or even in the Executive order. Indeed, there were at the time no such things as money claims. Relief possible under the First War Powers Act was only such relief as might be had by modifying the terms of contracts. Hence, claims for relief under that act could, technically, ask no more.

"Section 307 of the Executive order in effect interprets the Lucas Act as a mere extension of the First War Powers Act and as not affording any broader basis for relief. It reads:

> Relief with respect to a particular loss claimed shall not be granted under the act unless the war agency considering the claim finds, or, in the case such loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945.

"Beyond cavil, the effect of section 307 is a restriction of the Lucas Act to cases which would have been allowable under the First War Powers Act, section 201. The Government does not deny this interpretation, but in

fact urges it as manifesting the true congressional intent in passing the Lucas Act.

"The Court of Claims and the district courts differ in their interpretation of the meaning of the Lucas Act and the effect of the Executive order upon it. The holding of the Court of Claims is in accord with those who insist that the Executive order is in contravention of the Lucas Act, while the district courts appear to be divided as to the validity of the position of the Government. Such a diversity of adjudication 5 years after the end of the 'shooting war' demonstrates a complete failure of the purpose of the Lucas Act and of Congress to afford a plain, speedy, and adequate relief for smaller contractors who suffered ruinous losses." * * *

The conclusions of the report on page 6 are:

"It can be fairly stated that, if the intent of Congress in passing the Lucas Act was to offer relief beyond that afforded by the First War Claims Act, the administrative interpretation and the Executive order have aborted that intent. However, even if the holding of the Court of Claims is adopted as affirmative legislation, it should be perhaps considered that some of the amendments proposed to H. R. 3436 would carry the Lucas Act beyond its original intention, even as understood by the proponents of H. R. 3436. Some of the amendments would cover only one case or very few cases. Particularly, the amendment to require the allowance of the net loss on each contract would seem to overlook the fact that contractors who lost money on one contract frequently were made whole by the award of another contract or other contracts upon which a profit was made. It would seem generally that the intent in H. R. 3436 is merely to secure relief where untenable administrative interpretation of the Lucas Act had disallowed it, and that most of the amendments further expanding the grounds of relief would be undesirable. Some provision for reconsideration of cases disposed of under the administrative order would appear necessary if the purpose of H. R. 3436 is to be effected.

"*The committee are of the opinion that H. R. 3436 should be enacted, since it is abundantly clear that the administrative interpretation of the Lucas Act is in effect an abrogation of that act.* The committee believe that, with the amendments they have herein approved, H. R. 3436 will enable those contractors who have just claims to receive relief. The type of notice which is necessary under the committee bill is informal enough to permit contractors who called a loss or an impending loss to the attention of the Government to escape penalization because of technical interpretations of the words "request for relief," or because their claim was not one that would have been allowed under section 201 of the First War Powers Act, 1941. It is the opinion of the committee, as demonstrated in the report, that the purpose of the Lucas Act was to afford a broader basis of relief than had been given in the First War Powers Act, 1941, and that, beyond question, this purpose was aborted by the strict administrative interpretations. The intent of the present bill is to restore the relief provisions of the Lucas Act, and the committee, in approving H. R. 3436, wish it made clear that this bill, as amended, affords what the committee consider a just and equitable basis for relief, not confined to relief which might have been afforded under the First War Powers Act. The committee bill does not, however, broaden the class of persons entitled to relief under the act, nor does it permit any claimant who has not already timely filed his claim under the act to come in with a new claim at this late date.

"The committee are of the opinion that H. R. 3436 should be enacted, but not in the form in which it reached the Senate. While the committee agree that the administrative interpretations of the Lucas Act in effect abrogated that act, making relief virtually unobtainable, they feel that the provision of H. R. 3436 relating to oral notice is too broad, and that under it the Government would be assailed with claims which, because of the lapse of time, the dispersal of personnel, and the difficulty of rebutting pos-

sibly collusive evidence, the Government might be unable to meet. Moreover, the proposed language of H. R. 3436 redefining "relief" should be amplified to make it plain that the *notice* of losses sustained or impending, rather than the form of request for relief, is the important consideration. The committee have accordingly redrafted section 3 of the Lucas Act, as proposed to be amended in subsection (b) of the committee bill.

"Such is the heart of the present difficulties. The Lucas Act intended only that there should be no surprise claims. Unfortunately the word "relief," used originally, has technical connotations which may be and have been exploited to prevent the recourse provided and intended by the Lucas Act.

"The committee feel that in requiring written notice they are enabling the Government to defend itself against fraudulent claims. The committee feel that while the Lucas Act was subjected to a destructive interpretation, a new amendment thereto should require that contractors meet reasonable terms imposed by the act."

The veto messages of the President with regard to the Amendments H. R. 3436 and S. 3906 passed by Congress and above referred to (81st Congress, 2nd Session, Doc. No. 629 Cong. Rec. Vol. 96, No. 129, page 9745, and Doc. No. 203, Cong. Rec. Vol. 96, No. 165, page 13143) clearly indicate that the President has always contended that the Lucas Act was proposed to limit the Act to "claims or requests for relief that would have been granted under the First War Powers Act of 1941 but for the termination of hostilities with Japan on August 14, 1945."

The President in his veto message on H. R. 3436 (H. Doc. No. 629, 81st Cong.) and repeated in his veto message on S. 3906 (S. Doc. No. 203, Congressional Record, Vol. 96, No. 165, page 13143) stated:

"I cannot accept the contention that the purpose of the

War Contractors Relief Act * * * was other than to provide a basis for relief to those contractors whose cases would have been handled under the First War Powers Act if war had not ended. Had I believed there was a broader purpose, I would not have issued the kind of regulations which were promulgated in Executive Order 9786. These regulations were a faithful attempt to interpret the language of the act as affording nothing more than a statutory basis for the continued processing of written applications for relief under the First War Powers Act which were pending and undisposed of on August 14, 1945. * * *

"H. R. 3436, and the reports recommending its enactment, would radically change the basic purpose of the original War Contractors Relief Act. I believe that in spite of any administrative interpretation which might be made to limit the effects of the bill, its provisions not only require reconsideration of all claims originally filed, but might also be construed to permit reopening of an unknown number of cases settled under the First War Powers Act and the Contract Settlement Act. * * *"

The veto message goes on:

"I further stated that the net effect of a bill which would relax the requirements for filing notice contained in the War Contractors Relief Act and the regulations thereunder, permit the granting of relief beyond that afforded by the First War Powers Act, and exclude the finality of settlements made under the First War Powers Act and the Contract Settlement Act of 1944." * * *

The President, by that statement, therefore has apparently either overlooked or completely ignored the plain, simple, and unambiguous provisions of Section 3 of the Lucas Act which provides:

"* * * but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement

> Act of 1944 *shall not operate to preclude further relief otherwise allowable under this Act.*" (Italics ours.)

The President desires that the finality of settlements be not disturbed. The Lucas Act and Congress have indicated a contrary intention.

The language of Senator McCarran in reporting S. 3906 to the Senate (Cong. Record, Vol. 96, No. 147, page 11224, July 26, 1950) again reiterates the intention of Congress in its enactment of the legislation now before this Court for consideration. Senator McCarran stated:

> "*The broad purpose of this bill is the same as the broad purpose of the bill which was vetoed, namely, to effectuate the original intent of Congress in passing the Lucas Act* and provide relief to a number of contractors who suffered loss or damage without fault or negligence on their own part. It is meritorious legislation and should be passed." (Italics ours.)

Senator Lucas, the original proponent of the Lucas Act, in discussing the Amendment H. R. 3436 before the Senate (Vol. 96, No. 113, page 8206 of the Congressional Record) stated:

> "As first introduced, that act was clearly intended to provide continuing ground for relief under the First War Powers Act, even though the adjustment of the contract could no longer 'facilitate the prosecution of the war'. *However, it was decided to change the language*, so that the act, when finally enacted, read in part (italics ours):
>
> > 'To settle equitable claims of contractors * * * for losses (not including diminution of anticipated profits) incurred * * * without fault or negligence on their part in the performance of such contracts' * * *."

Senator Lucas, on the same page of the Congressional Record, makes this observation in the last column:

> "I think it may be advisable to add that the United States Court of Claims, where these contractors have filed claims in the past, has always held with the original theory of the Lucas Bill. In other words, it has said that they were entitled to relief. But the courts have divided upon the question, and that is one of the strongest reasons why it is desired to amend the act. There is no question about the merit of the claims involved, there is no question about the laws respecting the contracts."

Senator McFarland, in the Congressional Record of July 26, 1950, Vol. 96, No. 147, at page 11224, states:

> "As the Senator from Nevada[1] will recall, when this bill[2] was introduced the Senator from Illinois (Mr. Lucas) expressed his keen interest in it and his willingness to secure its passage. He has asked that I state on his behalf that he hopes very much action may be taken on the bill today."

The Report of The House of Representatives to accompany H. R. 3436 (81st Congress, 1st Session, Report No. 422) is a most enlightennig statement in support of the contentions of the petitioner in these proceedings. The report states:

> "STATEMENT.
>
> "The bill is designed to correct what is believed to be an injustice to World War II contractors brought about by a variance in interpretation of section 3 of the so-called Lucas Act (Public Law 657, 79th Cong.) between the adminstering agencies on the one hand and the Congress on the other, which has resulted in the granting of relief in only one instance

1. Mr. McCarran.

2. S. 3906 to Amend the War Contractors Relief Act (Lucas Act).

and rejection of scores of otherwise justifiable claims on flimsy technicalities.

"In general, the official view of the administering agencies is that the sole purpose of the Lucas Act was to afford relief only to those few war contractors who, on VJ-day (August 14, 1945) had applications pending for relief under the First War Powers Act (50 U. S. C., sec. 611) and Executive Order 9001 issued pursuant thereto, but whose applications could not be acted upon because after the capitulation of the enemy on August 14, 1945, no administrative determination could be made that affirmative action would facilitate the prosecution of the war; that only those claims that could be considered under the First War Powers Act, could be considered under the Lucas Act. *We believe this construction to be an erroneous interpretation of the intention of Congress in passing the Lucas Act. We believe that while relief under the First War Powers Act to World War II contractors was predicated solely on the interest of the Government in prosecuting the war, the Lucas Act was more remedial in its nature. The Lucas Act was broader in its application and under it the contractor was required to show, not that the granting of relief would facilitate prosecution of the war; but that, without fault or negligence on his part, he had suffered a net loss on his Government contracts during the statutory period, and that during that period he had requested relief in writing from the agency or department involved.*

"The Committee is informed that the technicality most frequently indulged in by the Government in its rejection of claims under the Lucas Act has been that the request for relief lacked the formalities which the agencies read into the simple language of the act, but as to which the act was silent. Thus, it is contended that the request for relief referred to in the statute required a specific request that the contract be amended without consideration under the extraordinary contracting authority conferred by the First War Powers Act. The act cannot and should not be so read.

"In the urgency of the war years and because of the potpourri of emergency regulations hastily concocted and thrown at war industries, the average contractor had no opportunity to acquaint himself with the niceties and refinements of official red tape. The precise form of an application under section 201 of the First War Powers Act was nowhere prescribed. Applications conformed to no particular style. Some were simple invoices in a context of correspondence or discussions indicating a contract amendment was necessary if the contractor was to carry one; others were couched in indefinite language as part of general correspondence between the agency and the contractor relating to disputes as to contract terms; still others may have been mere memoranda which were embellished by oral representations in the course of conferences. It is the purpose of the bill to relax the agency-imposed formal requirements of these requests for relief and to make equivalents out of such tangibles as demands for payment of losses or statements of such losses which were sufficient to inform the Government or the prime contractor (in the case of subcontractors) that a loss was being suffered, was anticipated, or had been suffered by the contractor or subcontractor in connection with the work in question.

"We do not propose overgenerosity with Federal funds or to reward those who are not equitably entitled. Nor do we propose to be niggardly toward the contractors of World War II by an unduly restrictive definition of the remedial provisions of a relief statute by insistence on unintended technicalities so as to abridge the rights of legitimate claims.

"The courts appear to be divided on the point raised in this report. While some adhere to the statutory construction impressed on the Lucas Act by the Government (*Fogarty* v. *United States*, 80 Fed. Supp. 90, and *Davidson & Reid* v. *U. S.*, Civil Action No. 2546-48 in the District Court of the United States for the District of Columbia), more recently the United States Court of Claims has taken the opposite view (*Howard Industries, Inc.* v. *U. S.*, No. 48874; *Modern Engineer-*

ing Co., Inc. v. *U. S.*, No. 48876; and *Milwaukee Engineering and Shipbuilding Co.* v. *U. S.*, No. 48888; all decided on April 4, 1949, by the United States Court of Claims on motions to dismiss). Because of this judicial conflict, the committee feels that legislative clarification is more than ever imperative. (Italics ours.)

The House of Representatives Committee on the Judiciary, after the veto message of the President with regard to H. R. 3436, in reporting on the House amendment ultimately enacted as S. 3906 in its Report (81st Congress, 2nd Session, Report No. 2704, July 20, 1950) stated at Page 1 of the Report:

"This bill is in response to the veto by the President on June 30, 1950, of H. R. 3436, which was passed unanimously by both Houses of Congress. It is designed not only to comply with the specifically enumerated proposals contained in the veto message for legislation acceptable to the President, but also to reassert the original purposes of the Lucas Act.

"Consideration of the construction and interpretation of the Lucas Act by the administering agencies clearly reveals the necessity for clarifying legislation. The frustration of the original intent of the Lucas Act is adequately described in the House committee report which accompanied H. R. 3436 (H. Rept. 422, 81st Cong.), to which we advert with approval."

At Page 3, the Report goes on:

"An accelerated national defense program is inevitable as attested by the recent message of the President recommending the reinstitution of many of the wartime controls as a means of protecting the national security in the troublous times that lie ahead. This spells a vastly enlarged program of military procurement and it is essential that the small contractors be encouraged to participate to the fullest extent with the knowledge that they will receive fair and equitable treatment by their Government."

In the light of the foregoing, there can be no further dispute as to the intention of Congress in enacting the Lucas Act now before this Court.

It is clear therefore that it is only by virtue of a misinterpretation of that Act by the Executive branch of our Government that the controversy involved herein (which should be determined on the merits and on facts produced at a trial before a court of competent jurisdiction) has come before this tribunal on questions of law which in light of recent Congressional action are not now subject to debate.

CONCLUSION.

The Courts below, by reason of their misconception and misinterpretation of the intent and purpose of the War Contracts Hardship Claims Act (Lucas Act), have failed to grant unto the petitioner the relief which Congress intended.

The clear and unequivocal language of the Act indicates that the spirit and purpose thereof was to attempt to render justice on the ground of fair play to those who have tried to and have served the Government during the war. The Legislature has indicated to the contractors and subcontractors that they will always receive just consideration in regard to such contracts as are fulfilled during emergency periods. It is an indication to our citizenry that our all-out effort can be supplied without hesitancy because of the assurance that our Government will deal with the contractors on a basis of equity and justice. This type of legislation must of necessity receive a liberal construction. To interpret it otherwise would be to emasculate it. To place the construction upon it contended for by the Courts below would nullify it.

The Act is clear and unambiguous; its intendments are

simple. The clearly stated objectives of the Lucas Act indicate that the petitioner is entitled to a hearing of the cause upon the merits and to such a finding as he is entitled, after the Court shall have determined the equities involved pursuant to Section 6 of the Act.

The petitioner, therefore, respectfully requests that the order of the District Court of August 28, 1948 (Rec. p. 17) granting the respondent's motion for a summary judgment, and the findings of the United States Court of Appeals, Eighth Circuit, in its opinion of August 24, 1949 (Rec. p. 36), affirming the judgment of the District Court, be reversed and that the cause be remanded with directions to proceed with a hearing of the cause upon its merits for the purpose of affording the petitioner the relief to which he is entitled under the Act.

Respectfully submitted,

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APPENDIX.

Statutes and Executive Orders Involved

[Public Law 657—79th Congress]
[Chapter 864—2d Session]
[S. 1477]

41 U. S. C. 106 Note, 60 Stat. 902
Act of August 7, 1946

An Act

To authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U. S. C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the

head of the department or agency concerned or by a central authority therein designated by such head.

SEC. 2. (a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940, and August 14, 1945, and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. Wherever a department or agency considering a claim under this Act finds that losses under any such contract or subcontract affected the computation of the amount of excessive profits determined in a renegotiation agreement or order, and to the extent that the department or agency finds such amount was thereby reduced, claims for such losses shall not be allowed under this Act.

(b) Every claimant under this Act shall furnish to the department or agency concerned any evidence within the possession of such claimant bearing upon the matters referred to in subsection (a) of this section.

SEC. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

SEC. 4. Appropriations or funds available for work, supplies, or services of the character involved in the respective claims at the time of settlement thereof shall be available for payment of the settlements: *Provided*, That where no such appropriations are available, appropriations for payment of such settlements are hereby authorized.

SEC. 5. Each department and agency shall report to the Congress quarterly the name of each claimant to whom relief has been granted under this Act, together with the amount of such relief and a brief statement of the facts and the administrative decision.

SEC. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision of the court as in other equity cases.

Approved August 7, 1946.

Section 37 of P. L. 773, 80th Cong., 2d Sess., approved June 25, 1948, revising 28 U. S. C., amended Sec. 6 as follows:

> "SEC. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims, or, if the claim does not exceed $10,000 in

amount or suit has heretofore been brought or is brought within 30 days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency ~~concerned~~ under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory act, be transferred to the Court of Claims for original disposition in that court."

Executive Order 9786 (11 F. R. 11553) provides in pertinent part as follows:

Regulations Governing the Consideration, Adjustment, and Settlement of Claims Under Public Law 657, Approved August 7, 1946.

By virtue of and pursuant to section 1 of Public Law 657, 79th Congress, 2d Session, approved August 7, 1946, and in the interest of the expeditious disposition of claims under contracts to which this order is applicable, the following Regulations are hereby prescribed to govern the filing, consideration, adjustment, and settlement of claims by contractors against departments and agencies of the Government under the said Public Law.

PART I—DEFINITIONS.

101.7 The term "cost of performance" means the reasonable and necessary cost to a contractor or subcontractor of work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, determined in accordance with the accounting practices of the contractor or subcontractor consistently applied during performance of the contract or subcontract, provided such practices accord with recognized commercial accounting practices. Such cost shall include, to the extent reasonable and necessary, direct costs and a properly allocable proportion of indirect costs, ~~but shall~~ not include the following items:

* * * * * * *

n. Any item of cost which the contract or subcontract or renegotiations thereof expressly contemplated would not be reimbursed or compensated or allowed for.

101.8 The term "contract price" means the aggregate of all amounts (before taxes and statutory renegotiation) paid or payable to a contractor or subcontractor for work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, including any amounts paid or payable pursuant to any amendment, adjustment, or settlement of or on account of such contract or subcontract under the First War Powers Act, 1941, the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, secs. 101-125), or otherwise.

101.9 The term "loss" means the amount by which the cost of performance of a contract or subcontract exceeds the contract price thereof.

101.11 The term "net loss" means the amount by which the aggregate of the costs of performance under all contracts and subcontracts exceeds the aggregate of the contract prices under all contracts and subcontracts, after giving appropriate effect to action in renegotiation proceedings in respect of the statutory period.

101.12 The term "claim" means a claim for relief under the Act.

101.13 The term "claimant" means a contractor or subcontractor who files a claim under the Act.

Part II—Filing of Claim.

201. No claim shall be received or considered by any war agency unless properly filed in accordance with the Act and these regulations on or before February 7, 1947.

202. Each claim shall be in writing and shall contain or shall be accompanied by:

* * * * *

(e.) A copy of each written request filed on or before August 14, 1945, with the war agency concerned, for relief with respect to the losses claimed.

(f.) A copy of any other written request filed prior or subsequent to August 14, 1945, with any agency for relief with respect to the losses claimed.

(g.) A statement of any other relief sought from the government with respect to the losses claimed.

203. No more than one claim shall be filed under the Act by any one claimant. Each claim shall be filed in quadruplicate with the war agency with respect to whose contracts and subcontracts claim for loss is made. When claim for loss is made with respect to contracts and subcontracts of more than one war agency, the claim shall be filed with the war agency with respect to whose contracts and subcontracts the largest claim for loss is made.

204. No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date.

* * * * *

Part III—Settlement of Claims.

304. No claim shall be allowed by any war agency except if and to the extent that the war agency finds that the claim is (a) equitable under all the circumstances and (b) for losses incurred without fault or negligence on the part of the claimant.

305. No claimant shall be granted relief under the Act and these Regulations in any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant pursuant to which work, supplies, or services were furnished for the Government during the statutory period.

307. Relief with respect to a particular loss claimed shall not be granted under the Act and these Regulations unless the war agency considering the claim finds, or, in the case such loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945.

308. Where a claim is settled by agreement between the war agency and the claimant, the agreement shall be reduced to writing and signed by both parties and shall include an unconditional release by the claimant of all claims whatsoever of the claimant against the Government or any department or agency thereof as to all contracts and subcontracts involved in consideration of the claims. Payment, within the limits of appropriations available for such purposes, shall be made by the war agency upon the basis of the executed agreement.

309. Where a claim is not settled by agreement, the war agency shall deliver to the claimant a written statement as to the amount, if any, due on the claim, but shall make no payment of any amount so found to be due until the claimant shall have delivered to the war agency an unconditional release of all claims whatsoever of the claimant against the Government or any department or agency thereof as to all contracts and subcontracts involved in consideration of the claims.

HARRY S. TRUMAN.

The White House,
October 5, 1946.

Section 201 of the First War Powers Act, 50 U. S. C. App. 611, Act of Dec. 18, 1941, 55 Stat. 839, provides:

> The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems that such action would facilitate the prosecution of the war: *Provided*, that nothing herein shall be construed to authorize the use of the cost-plus-a-percentage of cost system of contracting: *Provided further*, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further*, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President, and when deemed by him not to be incompatible with the public interest.

Title I, Par. 3, of Executive Order 9001, promulgated December 27, 1941 (6 F. R. 6787) reads as follows:

> The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any per centum of the contract price and may enter into contracts with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds whenever, in the judgment of the War Department, the Navy Department, or the Unied States Maritime Commission respectively the prosecution of the war is thereby facil-

itated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same thing as any original contract could have accomplished thereunder, irrespective of the time or circumstances of the making of or the form of the contract, amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.